

INDEX

PAGE

Petition for Enforcement of an Order of the National Labor Relations Board	1
Appendix A—Notice	6
The Charge (General Counsel's Exhibit 1-A)	8
Complaint (General Counsel's Exhibit 1-D)	11
Respondent's Answer (General Counsel's Exhibit 1-F)	16
Notice of Motion to Amend the Complaint (General Counsel's Exhibit 1-H)	19
Board's Decision and Order (Including Trial Examiner's Intermediate Report)	22
Appendix A—Notice	38
Intermediate Report and Recommended Order	40
Appendix A—Notice	74

TESTIMONY:

Witnesses for the Board:

Willard C. Fowler	
Direct	80
Cross	105
Redirect	124

Robert H. Frey

Direct	132
Cross	143
Redirect	200
Recross	200

Fred M. Howe

Direct	149
Cross	165

Respondent's Witnesses:

Fred M. Howe

Direct	173
Cross	180
Redirect	188

Joseph P. Glynn

Direct	188
--------------	-----

EXHIBITS:

General Counsel's Exhibits:

Exhibit 1-A—The Charge (marked in evidence at fol. 231)	8
Exhibit 1-D—Complaint (marked in evidence at fol. 231)	11
Exhibit 1-F—Respondent's Answer (marked in evidence at fol. 231)	16
Exhibit 1-H—Notice of Motion to Amend the Complaint (marked in evidence at fol. 231)	19

Exhibit 2—Letter dated March 21, 1950 signed by W. A. Kiggins, Jr. Vice President of A. H. Bull & Company (marked in evidence at fol. 237)	203
Exhibit 3—Telegram received from the Bull Steam- ship Company on February 24, 1948 (marked in evidence at fol. 243)	204
Exhibit 4—Telegram received from Radio Officers' Union on February 27, 1948 (marked in evidence at fol. 254)	205
Exhibit 5—Commercial Telegraphers Union card show- ing payment of dues by Willard C. Fowler dated January 6, 1948 (marked in evidence at fol. 259)	206
Exhibit 6—Letter dated March 25, 1948 from The Radio Officers' Union to Willard C. Fowler (marked in evidence at fol. 280)	207
Exhibit 7-A—Union card showing Willard C. Fowler to be in good standing (marked in evidence at fol. 283)	208
Exhibit 7-B—Union dues receipt dated March 25, 1948 (marked in evidence at fol. 283)	209
Exhibit 14—Extract from the By-Laws of the Radio Officers' Union (marked in evidence at fol. 476) ..	210
Exhibit 16—Telegram from Radio Officers Union ad- dressed to A. H. Bull Co. (marked in evidence at fol. 545)	212

Respondent's Exhibits:

Exhibit 2—Standard dry cargo and passenger ship agreement of 1947 between Radio Officers' Union and various lines including A. H. Bull Steamship Co. and Waterman Steamship Corp. (marked in evidence at fol. 353)	213
Exhibit 3—Memorandum of agreement bearing date August 16, 1947 between the Radio Officers' Union and A. H. Bull Steamship Co. (marked in evidence at fol. 353)	217

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
No.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus

THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL,
Respondent.

**Petition for Enforcement of an Order of the
National Labor Relations Board**

*To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:*

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL (hereinafter referred to as Respondent), and its agents. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of the Radio Officers' Union of the Commercial Telegraphers Union, AFL, and Willard Christian Fowler, an individual, case No. 2-CB-91."

In support of this petition the Board respectfully shows:

*Petition for Enforcement of an Order of the
National Labor Relations Board*

(1) Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of New York, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on April 18, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, and its agents. The aforesaid provides as follows:

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, the Radio Officers' Union of the Commercial Telegraphers Union, AFL, and its agents, shall:

1. Cease and desist from:

(a) Causing or attempting to cause A. H. Bull Steamship Company, its successors and assigns, to discriminate against Willard Christian Fowler or any other employee in violation of Section 8 (a) (3) of the Act; and

(b) Restraining or coercing employees or prospective employees of A. H. Bull Steamship Company, its succes-

*Petition for Enforcement of an Order of the
National Labor Relations Board*

7

sors and assigns, in the exercise of their right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A), or by an agreement requiring membership in the Respondent as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

8

(a) Notify A. H. Bull Steamship Company in writing that it withdraws any objection to the employment of Willard Christian Fowler and requests it to offer him immediate employment;

(b) Notify Willard Christian Fowler that it has advised A. H. Bull Steamship Company that it withdraws its objection to his employment and requests it to offer him immediate employment;

(c) Make whole Willard Christian Fowler in the manner set forth in the Intermediate Report in the section entitled "The remedy";

9

(d) Post at its office in New York City copies of the notice attached hereto and marked Appendix A.¹² Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period

¹² In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "Decision and Order," the words, "Decree of the United States Court of Appeals Enforcing."

10 *Petition for Enforcement of an Order of the
National Labor Relations Board*

of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

11 (e) Mail to the Regional Director for the Second Region signed copies of the notice attached hereto as Appendix A for posting, the Employer willing, at the office and docks of A. H. Bull Steamship Company, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being signed as provided in paragraph 2 (d) above, be forthwith returned to said Regional Director for said posting;

(f) Notify the Regional Director for the Second Region in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

12 (3) On April 18, 1951 the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of facts, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript

*Petition for Enforcement of an Order of the
National Labor Relations Board*

13

to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent and its agents to comply therewith.

NATIONAL LABOR RELATIONS BOARD

14

By /s/ A. Norman Somers

A. Norman Somers

Assistant General Counsel

Dated at Washington, D. C.

this 26 day of October 1951.

15

16

APPENDIX A

NOTICE

TO ALL MEMBERS OF THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, AND TO ALL EMPLOYEES AND PROSPECTIVE EMPLOYEES OF THE A. H. BULL STEAMSHIP COMPANY

17.

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause A. H. BULL STEAMSHIP COMPANY or its successors and assigns, to discriminate against Willard Christian Fowler or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

18

WE WILL NOT restrain or coerce employees or prospective employees of the A. H. BULL STEAMSHIP COMPANY, its successors or assigns, in their exercise of the right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso in Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as

*Appendix A Attached to Petition for Enforcement of an
Order of the National Labor Relations Board* 19

a condition of employment, as authorized in Section 8
(a) (3) of the Act.

WE WILL notify in writing the A. H. BULL STEAM-
SHIP COMPANY that we withdraw our objections to
the employment by it of Willard Christian Fowler and
request it to offer him employment as a radio officer.

WE WILL notify Willard Christian Fowler that we
have advised A. H. BULL STEAMSHIP COMPANY 20
that we withdraw our objections to his employment
and that we request it to offer him employment as a
radio officer.

WE WILL make Willard Christian Fowler whole for
any loss of pay suffered by him as the result of our
having prevented his hire by A. H. BULL STEAM-
SHIP COMPANY.

THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL
(Union)

Dated..... By..... 21
(Representative) (Title)

This notice must remain posted for sixty (60) days from
the date of posting and must not be altered, defaced, or
covered by any other material.

22

The Charge
(General Counsel's Exhibit 1-A)

NLRB 508
(10-20-47)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS**

23

1. Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that RADIO

(Name

OFFICERS UNION at 1440 Broadway, New York, N. Y.
of labor organization or its agents)

has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8(b) subsections 1 and 2 of said Act, in that: (Recite in detail in paragraph 2 the basis of the charge. Be specific as to names, addresses, plants, dates, places, and other relevant facts)

24

2. On or about February 28, 1948 and April 26, 1948, it caused A. H. BULL STEAMSHIP COMPANY to discriminate against the undersigned on some ground other than failure of the undersigned to tender the periodic dues required for retaining membership in said labor organization.

By the above and by other acts, the said labor organization, by its officers, agents or employees, has restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

The Charge
(General Counsel's Exhibit 1-A)

25

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

3. Name of Employer A. H. BULL STEAMSHIP COMPANY

4. Location of plant involved 115 Broad Street, New
(Street)
York, N. Y. Employing unknown
(City) (State) (Number of workers)

26

5. Nature of business Steamship operators and agents

6. (Paragraphs 6, 7, and 8 apply only if the charge is filed by a labor organization) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(A), 9(f)(B)(1), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing code number The financial data filed with the Secretary of Labor is for the fiscal year ending
..... A Certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor. not applicable.

27

7. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act.*

* Not applicable.

28

The Charge
(General Counsel's Exhibit 1-A)

8. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

WILLARD CHRISTIAN FOWLER

(Full name of party filing charge)

29

68 S. W. 8th Street, Miami 36, Florida 2-1366
(Address) (Street) (City) (State) (Telephone number)

By (Signed) **WILLARD CHRISTIAN FOWLER**
(Signature of representative or person filing charge)

Individual

(Title or office, if any)

Subscribed and sworn to before me this 16th day of June 1948 at Miami, Fla. as true to the best of deponent's knowledge, information and belief.

(Signed) **HELEN E. FIRMAN**

(Board Agent or Notary Public)

30

Notary Public, State of Florida at Large.

My commission expires March 7, 1951.

(NOTARIAL SEAL)

DO NOT WRITE IN THIS SPACE

Case No. 2-CB-91

Date filed 6/18/48

9(f),(g),(h) cleared

Complaint
(General Counsel's Exhibit 1-D)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
- SECOND REGION
Case No. 2-CB-91

In the Matter of
THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL

and

WILLARD CHRISTIAN FOWLER, an individual

It having been charged by Willard Christian Fowler, an individual, of 68 Southwest 8th Street, Miami, Florida, that The Radio Officers' Union of the Commercial Telegraphers Union, AFL, of 1440 Broadway, New York, New York, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C., Supp. I, Sec. 151, *et seq.*, hereinafter referred to as the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Second Region, designated by the Board's Rules and Regu-

34

Complaint
(General Counsel's Exhibit 1-D)

lations—Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

1. A copy of the Charge in this proceeding was served upon Respondent on June 19, 1948.

35

2. A. H. Bull Steamship Company, hereinafter referred to as the Employer, is and has been since 1902, and at all times hereinafter mentioned, a corporation duly organized under and existing by virtue of the laws of the State of New Jersey.

3. At all times herein mentioned, the Employer has maintained its principal office and place of business at 115 Broad Street, in the City, County and State of New York.

4. The Employer is and at all times mentioned herein has been continuously engaged in operating its own ships and ships chartered by it, in coastwise and foreign shipping.

36

5. During each of the years 1948 and 1949, the Employer, in the course and conduct of its business operations, transported by steamship articles and commodities valued in excess of \$5,000,000 in interstate and foreign commerce between various states of the United States and between the United States and foreign countries.

6. The aforesaid Employer is and has been engaged in commerce within the meaning of the Act.

7. Respondent is a labor organization within the meaning of Section 2(5) of the Act, and has its principal office

Complaint
(General Counsel's Exhibit 1-D)

37

and place of business at 1440 Broadway, in the City, County and State of New York.

8. Respondent, by its officers, agents, organizers and representatives, has since on or about April 26, 1948, caused and/or attempted to cause the Employer to discriminate against its prospective employee, Willard Christian Fowler, in regard to hire or tenure of employment and other terms or conditions of employment, by demanding and requiring that the said Employer withdraw an offer of employment which it had made to said Willard Christian Fowler, and by demanding and requiring that said Willard Christian Fowler be refused employment by the said Employer.

38

9. The Employer, pursuant to and because of the afore-said demands of Respondent, on or about April 26, 1948 withdrew its offer of employment from its prospective employee, Willard Christian Fowler, and refused to employ him.

10. Since on or about April 26, 1948, the Employer has failed and refused, and continues to refuse, to employ the said Willard Christian Fowler in his formerly offered position or employment or in a substantially equivalent position or employment.

39

11. The Employer did refuse to employ said Willard Christian Fowler, and continues to refuse to employ him, by reason of the demands of Respondent, referred to in paragraph 8, above.

*Complaint**(General Counsel's Exhibit 1-D)*

12. By the acts described in paragraphs 9, 10 and 11, above, the Employer did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of its prospective employee, Willard Christian Fowler, thereby encouraging membership in a labor organization.

13. By the acts described in paragraph 8, above, Respondent did restrain and coerce and now restrains and coerces employees or prospective employees of the Employer in the exercise of the rights guaranteed by the Act, and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

14. By the acts described in paragraph 8, above, Respondent did cause and/or attempt to cause and is causing and attempting to cause the Employer to discriminate in regard to the hire or tenure or terms or conditions of employment of its prospective employee, Willard Christian Fowler, thereby encouraging membership in a labor organization and, by all of said acts and by each of them, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

15. The activities of Respondent and of the Employer, described in paragraphs 8, 9, 10 and 11, above, occurring in connection with the operations of the Employer, described in paragraphs 2, 3, 4, 5 and 6, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and between the states of

*Complaint**(General Counsel's Exhibit 1-D)*

43

the United States and foreign countries, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(1) and (2) and Section 2(6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Second Region, on this 2nd day of March, 1950, issues this Complaint against The Radio Officers' Union of the Commercial Telegraphers Union, AFL, respondent herein.

44

(Signed) CHARLES T. DOUDS
CHARLES T. DOUDS

Charles T. Douds, Regional Director
National Labor Relations Board
2 Park Avenue
New York 16, New York

45

46

**Respondent's Answer
(General Counsel's Exhibit 1-F)**

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION
Case No. 2-CB-91

47

In the Matter of
THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL
and

WILLARD CHRISTIAN FOWLER, an individual

48

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, respondent herein, answering the Complaint herein, alleges as follows:

1. Denies the allegations of paragraph numbered "1" of the Complaint, except that it admits service upon it of a copy of the charge annexed to the Complaint in this proceeding.
2. Denies knowledge or information sufficient to form a belief as to each and every allegation of the Complaint contained in paragraphs numbered "2", "4", "5" and "10".

Respondent's Answer
(General Counsel's Exhibit 1-F)

49

3. Denies each and every allegation contained in paragraphs of the Complaint numbered "8", "9", "11", "12", "13", "14" and "15".

WHEREFORE, THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, respondent herein, prays that the Complaint herein be dismissed.

BUTTER & SILVERMAN
Attorney for Respondent
 Office & P. O. Address
 401 Broadway
 New York 13, N. Y.

50

Post Office Address of Respondent:

1440 Broadway
 Borough of Manhattan
 City of New York.

STATE OF NEW YORK,
 CITY OF NEW YORK,
 COUNTY OF NEW YORK, ss.:

51

FRED M. HOWE, being duly sworn, deposes and says that he is the General Secretary-Treasurer of the respondent in the within proceeding; that he has read the foregoing ANSWER and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein

52

Respondent's Answer
(General Counsel's Exhibit 1-F)

stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Signed) FRED M. HOWE
Fred M. Howe

Sworn to before me this
9th day of March, 1950.

53

(Signed) BESSIE M. STEWART

Bessie M. Stewart
Notary Public in the State of N. Y.
Qualified in New York County
No. 31-3847250
Cert. filed in Kings, Bronx and
Queens Co. Clk's & Reg. Office
Commission expires March 30, 1951

54

**Notice of Motion to Amend the Complaint
(General Counsel's Exhibit 1-H)**

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION
Case No. 2-CB-91

In the Matter of
THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL
and
WILLARD CHRISTIAN FOWLER, an Individual

S I R S :

PLEASE TAKE NOTICE that upon the opening of the hearing in the above-entitled matter, now set for the third day of April, 1950, at 1:00 p.m., in the Hearing Room, on the 24th Floor, 2 Park Avenue, New York, New York, or as soon thereafter as counsel may be heard, the undersigned will move to amend the Complaint heretofore issued herein in the following respects:

A. By amending paragraph 8 of said Complaint to read as follows:

Notice of Motion to Amend the Complaint
(General Counsel's Exhibit 1-H)

8. Respondent, by its officers, agents, organizers and representatives, has since or or about February 27, 1948, and since on or about April 26, 1948, caused and/or attempted to cause the Employer to discriminate against its prospective employee, Willard Christian Fowler, in regard to hire or tenure of employment and other terms or conditions of employment, by demanding and requiring that the said Employer withdraw offers of employment which it had made to said Willard Christian Fowler, and by demanding and requiring that said Willard Christian Fowler be refused employment by the said Employer.

B. By amending paragraph 9 of said Complaint to read as follows:

9. The Employer, pursuant to and because of the aforesaid demands of Respondent did, on or about February 27, 1948, and on or about April 26, 1948, withdraw its offers of employment from its prospective employee, Willard Christian Fowler, and refused to employ him.

C. By amending paragraph 10 of said Complaint to read as follows:

10. Since on or about February 27, 1948, and since April 26, 1948, the Employer has failed and refused, and continues to refuse, to employ the said Willard Christian Fowler in his formerly offered position or

Notice of Motion to Amend the Complaint
(General Counsel's Exhibit 1-H)

61

employment, or in a substantially equivalent position
 or employment.

Dated at New York, New York
 this 31st day of March, 1950.

(Signed) OSCAR GELTMAN
 Oscar Geltman
 Counsel for the General Counsel
 National Labor Relations Board
 Second Region
 2 Park Avenue
 New York 16, New York

62

To:

Butler & Silverman, Esquires
 By: Abner H. Silverman, Esq.
 401 Broadway,
 New York 13, New York
 Counsel for Respondent,
 The Radio Officers' Union of the
 Commercial Telegraphers Union, AFL

63

Respondent,
 The Radio Officers' Union of the
 Commercial Telegraphers Union, AFL
 1440 Broadway
 New York 18, New York

Decision and Order

D-4749

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Case No. 2-CB-91

In the Matter of

THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL

and

WILLARD CHRISTIAN FOWLER, an individual

On July 24, 1950, Trial Examiner William F. Scharni-
kow issued his Intermediate Report in the above-entitled
proceeding, finding that the Respondent had engaged and
was engaging in certain unfair labor practices in violation
of Section 8(b)(1)(A) and 8(b)(2) of the National La-
bor Relations Act, as amended, and recommending that it
cease and desist therefrom and take certain affirmative ac-
tion, as set forth in the copy of the Intermediate Report at-
tached hereto. Thereafter, the Respondent filed exceptions
to the Intermediate Report and a supporting brief.¹ The
General Counsel also filed a brief.

¹ The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and briefs, adequately sets forth the positions of the parties.

Decision and Order

67

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions:

1. We agree with the Trial Examiner's conclusion that the Respondent unlawfully caused A. H. Bull Steamship Company to discriminate against Fowler in regard to his hire as a radio officer. We have carefully considered each of the grounds urged in the Respondent's brief for rejection of the Trial Examiner's recommendations, and find them insubstantial.

68

The heart of the defense is the contention that the Respondent's contract with the Company by its terms provides for a hiring hall, and that therefore the Respondent could resist the Company's attempts to hire Fowler by direct negotiations. We are satisfied that the contract contains no such provision. It makes no reference to a hiring hall by name, nor does it otherwise provide for hiring through the Union. On the contrary, it expressly reserves to the Company the right freely to select its radio officers. The sole condition of employment imposed by the contract is preference to union members in good standing if such employees are available.

69

The Respondent's assertion that there is a "hiring hall" provision rests primarily upon the fact that the contract requires the Union to grant clearances to union members in good standing. This obligation by the Union follows immediately after the reservation to the Company of the

70

Decision and Order

right of free selection and its promise to take appropriate measures to assure that newly hired personnel are in good standing with the Union.² Logic impels the conclusion that these two obligatory provisions are complementary; the Company is charged with responsibility to ascertain the good standing of any radio officers it might hire, and the Respondent, best informed as to their union standing, is obligated to certify their status and thereby assure the Company that it has carried out its contractual obligation.

71

That this is the correct import of the clearance provision of the contract, and that such understanding is not, as our dissenting colleague believes, incompatible with the right of free selection by the Company, is definitely established by the last clause in the same section 6: it reads, "If an employee is not a member in good standing, the Union will so notify the Company in writing." If, as the Respondent contends, the Company were only permitted to hire employees referred by the union, there could be no occasion for the union to advise the Company that any particular employee, referred from the union hall, was not in good standing. This last sentence of section 6 could only refer, then, to the situation where the Company directly hires an employee whom it believes to be in good standing, but who, in the opinion of the union, is not.³

72

² Article I, section 6, of the contract reads as follows:

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

³ In concluding that the contract permitted the Company to hire employees directly, we do not rely on Article I, section 3, of the agreement,

We conclude, therefore, as did the Trial Examiner, that the contract was clear on its face and did not provide for any hiring hall arrangement. In these circumstances, the Trial Examiner properly excluded evidence relating to the parties' interpretation of its provisions and to their hiring practices during the period of its existence.⁴ Assuming, however, that the contract was in any sense ambiguous on its face, evidence as to the understanding of the parties outside the contract would nevertheless be irrelevant to this proceeding. We are here considering a contract urged as a defense to otherwise illegal conduct. As the Board has long held: "In view of the stringent requirements of closed-shop provisions, it is not too much to require that the parties thereto express the essentials of such provisions in unmistakable language."⁵ Where contracts are urged as defenses to otherwise illegal conduct, we perceive no significant differences between construing closed shop and hiring hall clauses. In either case contractual authority to engage in the permissible limited inroad into the protection afforded all employees by Section 7 of the Act must be clear and unambiguous. And the Board has not, as our dissenting colleague suggests, read hiring hall provisions into contracts where they did not clearly appear.⁶

74

75

requiring the Company to give the Respondent 24-hour notice before hiring a nonunion employee. We deem this clause compatible with either a hiring hall or a direct hiring arrangement.

⁴ *Western Can Co.*, 83 NLRB 489.

⁵ *Iron Fireman Manufacturing Co.*, 69 NLRB 19.

See, also, *Don Juan Co.*, 79 NLRB 154: "There is no such [maintenance of membership] obvious language in this contract, and the interpretation of the parties is not a substitute therefor."

⁶ The following contract clauses were deemed to establish hiring halls, although not so named:

76

Decision and Order

77

We are equally satisfied that the union security provision which the contract did contain—preferential hiring of members in good standing—cannot serve as a defense in this case. No claim is made that Fowler was suspended in April, the second occasion when the Respondent refused to clear him at the Company's request. Like the Trial Examiner, we find that he was also a union member in good standing in February, notwithstanding Respondent Representative Howe's hasty attempt to suspend him in disregard of Fowler's rights under the union bylaws and constitution. It is true that in the absence of the general chairman and of the general committee, Howe was authorized to act in their place and stead. It may also be true, as the Respondent asserts, that in February these special provisions of the bylaws were applicable, although the record contains no evidence supporting the assertion. However, in no event could Howe's authority exceed that of the general chairman, who in all instances was required by specific provisions of the bylaws to advise Fowler of his offense and to afford him an opportunity to conform with union rules before suspending him.⁷ It is clear that Fowler was not

78

National Maritime Union of America, 82 NLRB 1365, at page 1375.

"The Company agrees that during the period that this agreement is in effect all unlicensed personnel shall be obtained through the offices of the Union."

American Radio Association, 82 NLRB 1344, at page 1355: "All radio officers employed on such vessels shall be chosen from the list of unemployed radio officers on file at the nearest office of the Union."

National Maritime Union of America, 78 NLRB 971, at page 973: "The Union agrees to furnish satisfactory men and the Company agrees that during the period that this agreement is in effect, all replacements shall be hired through the offices of the Union, as vacancies occur."

⁷ Article 17, Section 1, of the Respondent's bylaws reads as follows:

"Any member violating the bylaws of the ROU, the CTU constitution, the contracts and agreements held by the ROU, and in any way con-

Decision and Order

79

given such opportunity; his purported suspension was therefore ineffectual. As he was a union member in good standing, he was not vulnerable to discrimination in his employment under the existing contract.

Our authority to look to the union rules to ascertain Fowler's union standing finds precedent in the Board's recent decision in *Pressed Steel and Car Co., Inc.*,⁸ where the Board did not consider itself bound by the union's interpretation of its own rules, but looked to the constitution and rules themselves before deciding whether a discharged employee had been in good standing or not.⁹

80

Nor do we find merit in the Respondent's contention that its conduct amounted only to a request and was not "cause," for the record clearly establishes that it was Howe's refusal to issue the clearances which brought about the dis-

tributing to the lessening of respect for the laws, rules, contracts, and agreements of the ROU, and the good name of the ROU, shall first be advised by the Officer of the ROU first having knowledge of the foregoing to correct his dereliction, and if such is persisted in and not abated, the member shall be immediately suspended by the General Chairman and have charges against him as provided in Article 7, Section 3, of these bylaws."

81

* 89 NLRB No. 36. Member Murdock dissented on another ground.

* For the following reasons, *Member Reynolds*, like *Member Murdock*, does not agree with the majority that because Fowler's suspension proceedings allegedly did not comport with certain procedural requirements of the Respondent's internal laws, the Respondent cannot rely on the union security contract to justify its discrimination against Fowler in February. In his opinion, since Section 102 of the Act preserves the validity of the instant contract executed prior thereto, action thereunder should be weighed in the light of the Board's practice under the Wagner Act of generally refusing to delve into a union's internal affairs. *Member Reynolds* therefore would not question the validity of the union's action in depriving Fowler of good standing in February and would limit his finding of discrimination to the Respondent's failure to clear Fowler in April when his good standing had been restored.

82

Decision and Order

83 crimination against Fowler.¹⁰ And, finally, as the Board has recently held, discrimination aimed at compelling obedience to union rules (in this case the job-rotation principle) encourages membership in a labor organization no less than discrimination designed to combat dual unionism.¹¹ For these reasons, and upon the record as a whole, we find, as did the Trial Examiner, that the Respondent violated Section 8 (b) (2) of the Act, in that it attempted to and did cause H. A. Bull Steamship Company to discriminate against Fowler in violation of Section 8 (a) (3) of the Act, and that the Respondent also thereby violated Section 8 (b) (1) (A) thereof. We reject, for the reasons set forth in *National Union of Marine Cooks and Stewards, CIO, and George C. Quinley an individual, supra*, the Respondent's further contention that no 8 (b) (2) finding can be made because the employer was not joined as a party.

84 2. In its brief the Respondent asserts that the record requires a finding that Fowler incurred a wilful loss of earnings after March 2 and after April 26. As the parties agreed at the hearing that this issue had not been fully litigated, we shall make no determination now on this matter, but instead defer it to the compliance stage of this proceeding.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as

¹⁰ See, *National Union of Marine Cooks and Stewards, CIO, and George C. Quinley, an individual*, 92 NLRB No. 147, and *Ambassador Venetian Blind Workers' Union, Local No. 2565, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL*, and *Viola Dodd, an individual*, 92 NLRB No. 148, as distinguished from *Denver Building and Construction Trades Council, et al. (Henry Shore)*, 90 NLRB No. 223.

¹¹ *American Pipe and Steel Company*, 93 NLRB No. 11.

Decision and Order

85

amended, the National Labor Relations Board hereby orders that the Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, and its agents, shall:

1. Cease and desist from:

(a) Causing or attempting to cause A. H. Bull Steamship Company, its successors and assigns, to discriminate against Willard Christian Fowler or any other employee in violation of Section 8 (a) (3) of the Act; and

86

(b) Restraining or coercing employees or prospective employees of A. H. Bull Steamship Company, its successors and assigns, in the exercise of their right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A), or by an agreement requiring membership in the Respondent as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

87

(a) Notify A. H. Bull Steamship Company in writing that it withdraws any objection to the employment of Willard Christian Fowler and requests it to offer him immediate employment;

(b) Notify Willard Christian Fowler that it has advised A. H. Bull Steamship Company that it withdraws its objection to his employment and requests it to offer him immediate employment;

(c) Make whole Willard Christian Fowler in the manner set forth in the Intermediate Report in the section entitled "The remedy";

88

Decision and Order

(d) Post at its office in New York City copies of the notice attached hereto and marked Appendix A.¹² Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

89

(e) Mail to the Regional Director for the Second Region signed copies of the notice attached hereto as Appendix A for posting, the Employer willing, at the office and docks of A. H. Bull Steamship Company, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being signed as provided in paragraph 2 (d) above, be forthwith returned to said Regional Director for said posting;

90

(f) Notify the Regional Director for the Second Region in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C.

Paul M. Herzog, Chairman

John M. Houston, Member

James J. Reynolds, Jr., Member

Paul L. Styles, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹² In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "Decision and Order," the words, "Decree of the United States Court of Appeals Enforcing."

ABE MURDOCK, MEMBER, *dissenting*:

I cannot concur with the conclusions reached by the majority in this case that the Respondent Union's conduct violated Section 8 (b) (1) (A) and Section 8 (b) (2) of the amended Act. Careful consideration of the record, in my opinion, compels the contrary finding that the Respondent was contractually empowered to refuse clearance to complainant Fowler, without violating the Act, and that in any event, Fowler was not a member in good standing of the Respondent at the time of the initial refusal of clearance.

The majority of my colleagues and the Trial Examiner found the facts in this case, briefly stated, to be as follows. On February 27, 1948, complainant Fowler was offered a position as radio officer by the Bull Steamship line on its ship, the *S. S. Frances*. Fowler was, at this time, a member in good standing of the Respondent. In order that a vacancy in the position of radio officer on the *Frances* might exist, however, it was necessary for the Company to discharge another member of the Respondent who was currently employed in that job. Upon complaint of the displaced member, Howe, the secretary-treasurer of the Respondent thereupon suspended Fowler for "bumping" another member and a subsequent request by the Company for clearance of Fowler for the position was denied by the Respondent. The suspension of Fowler was later lifted, but, when, on April 26, the Company again offered Fowler employment as a radio officer on its vessel, the *S. S. Evelyn*, clearance was once more refused by Respondent. As a consequence of the refusal to grant the clearances, the positions, in both instances were filled by other members of the Respondent. Admittedly, in both instances, negotiations for employment of Fowler were carried on by the

latter and the Company without reference to the Respondent other than the requests for clearance. The Respondent therefore contends that its actions were in accord with, and protected by, the terms of its contract with the Company and the "hiring hall" operated in conjunction with that agreement. I find the Respondent's argument persuasive.

There seems no question that, if the contract between the Respondent and the Company during the period concerned herein provided for employment of radio officers only through a union hiring hall, the denial of the clearances by the Respondent was both justified and protected under the terms of the amended Act.¹³ My disagreement with my colleagues, accordingly, centers upon the question of the existence of a hiring hall provision in that agreement. The record is clear, and indeed the Trial Examiner finds, that the various steamship companies, including the Bull line, who were parties to the contract, "generally requested the Respondent to furnish radio officers to fill vacancies." Further, "to meet these requests, the Respondent maintained a 'shipping list' of its unemployed members in the order of the termination of their last employment" and when a vacancy occurred, it was filled by offering the assignment and the requisite clearance to members of the Respondent on the shipping list in the order occurring there.¹⁴ Despite this clear showing of the existence and operation of a hiring hall, however, the Trial Examiner and the majority opinion contend such an arrangement

¹³ Under the provisions of Section 102 of the amended Act, the legality of such a restricted hiring procedure was protected for a stated period.

¹⁴ While exceptions to this procedure occurred, they were apparently rare and were reluctantly consented to by the Respondent.

Decision and Order

97

is without provision in the contract between the parties and is thus unavailable to the Respondent as a defense. This conclusion, in direct contradiction of the established facts, is reached in view of a purported lack of a clear hiring hall provision in the agreement, the reservation of the right of "free selection" of employees by the companies, and the inclusion of a clause providing for written notice by the Union where a selected member was not in good standing. I cannot agree.

The pertinent portions of the contract, as set forth in the Trial Examiner's Report, do not, by name refer to the establishment of a hiring hall for the employment of radio officers. To this extent the argument of the majority is well taken. In its previous decisions dealing with "hiring halls" in the maritime industry, however, the Board has never made such a condition prerequisite to finding the existence of such systems, and has, indeed, recognized the existence of hiring halls where the contracts did not establish them in name.¹⁵ Nor does the reservation of a right of free selection by the companies necessarily controvert the existence of a hiring hall.¹⁶ While the inclusion of this clause, as argued by the Trial Examiner and the majority of the Board, conceivably negates the inference that a hiring hall was created by the contract, it is equally interpretable as merely protecting the right of the companies

98

99

¹⁵ See footnote 6, *supra*: It should be further noted that in *National Maritime Union of America*, 82 NLRB 1365 at 1375, 1376, the Board regarded a contract stating, "The Company agrees that during the period this agreement is in effect all employment, except for the positions set forth in subsection (g), will be given to members of the Union when available in the Deck, Engine, and Stewards' Departments, provided that the prospective employees are satisfactory to the Company," as contemplating a hiring hall procedure.

¹⁶ See footnote 2, *supra*.

to reject unsuitable applicants for radio officer positions. As the Trial Examiner, at the hearing, excluded oral evidence as to the meaning of this term, among others, as interpreted by the parties, the precise effect of the language cannot be determined. On the other hand, the incontrovertible fact is that such "free selection" considered granted in the contract by my colleagues, was never utilized by the companies to that effect, nor was there any attempt to do so. Its abstract existence is accordingly rebutted by the realities of the factual situation before us. Furthermore, the requirement of "clearance" by the Respondent, a term the parties clearly indicated to be of special weight, before a free selection of applicants could be effected, is incompatible with the meaning attributed to the latter clause by the majority opinion. Finally, the reasoning of my colleagues that no occasion for written notice by the Respondent that any particular employee was not in good standing would arise unless the Company hired radio officers directly, misreads the clause in question.¹⁷

Upon the entire record, and in view of the foregoing, I am persuaded and would find that a lawful hiring hall was established by the contract in question. Accordingly, as the actions of the Respondent herein were in accord with that contract, I would dismiss the complaint in its en-

¹⁷ This clause does not refer to hiring alone, but also contemplates action taken in transferring or promoting employees. In these instances, it is clear, there would be ample reason for written notice by the Respondent if the recipient of the transfer or promotion was not in good standing. There is, therefore, no reason for assuming that the provision is inconsistent with a hiring hall. Moreover, as the majority opinion admits, the Trial Examiner's conclusion that no occasion for a twenty-four hour notice to the Respondent before the companies hired nonmembers would arise until, and unless, the companies had first directly and unsuccessfully sought to hire members of the Respondent is clearly erroneous.

Decision and Order

103

tirety. Assuming arguendo, however, the correctness of the majority position that no hiring hall existed in this instance, I believe the record further establishes that the Respondent was not guilty of infringement of the Act with respect to the refusal of a clearance to complainant Fowler on February 27. While it is agreed that Fowler was suspended by the Respondent's secretary-treasurer on February 27, and was, thus, presumptively not in good standing as required by the contract, these undenied facts are again evaded by the reasoning of the Trial Examiner and the majority opinion. It is contended, in this regard, that the suspension of Fowler by Howe was in derogation of the rights and procedures set forth in the constitution and bylaws of the Respondent. I find this reasoning unsupported by the record as well as without precedent in the Board's decision.

104

It would seem patent that the sole qualified judge of the good standing of a member of a labor organization is that organization itself acting through its elected officers. I find no cogent reason for this Board to usurp the position of judge in those matters nor has this Board done so in the past.¹⁸ The Trial Examiner found, and the majority opinion agrees, that the suspension of Fowler by Howe was without authority on the part of Howe and was consummated without reference to the provision of the Respondent's bylaws for warning to an offender and con-

105

¹⁸ I cannot agree with my colleagues that the *Pressed Steel* case, footnote 8, *supra*, serves as precedent for the action taken herein. In that instance, the provisions of the union constitution examined by the Board had been incorporated by reference into the agreement relied upon as a basis for the discharge. The union determination of "good standing," accordingly, was to that extent, a matter of contract clearly open for examination.

Decision and Order

106
107
108
tinuation of the offense. The bylaws, however, clearly authorize the secretary-treasurer, in the absence of the general chairman and the general committee, to take suspension action against a member of the Respondent.¹⁹ There is no affirmative showing in this record that these conditions were not met or that there were not repeated warnings to Respondent's members against "bumping" activities such as engaged upon herein by Fowler. Not only was there a complete lack of protest by Fowler that his rights had been abridged but the record lacks evidence other than mere supposition to show that the Respondent's rules were ignored. In basing their conclusion as to the illegality of the suspension on these grounds, the majority forces this Board into the new and untenable position of becoming the arbiter of proper observance of intraunion procedure. The impracticality of such a policy is self evident. In the present case, for example, it requires a Board determination as to the type and sufficiency of notice contemplated by the Respondent's bylaws—a task we are unqualified to assume and have no proper basis for deciding.²⁰ I do not believe the Act contemplated this Board as becoming an appellate court for adjudication of the minutiae of Robert's Rules of Order, when adopted by a labor organization.

¹⁹ Article 9, Section 12, of the Respondent's bylaws provide, in substance, that when the general committee is unable to act, its duties, including that of suspension, devolve upon the general chairman and the general secretary-treasurer. Article 7, Section 7, in turn, authorizes the secretary-treasurer to act as general chairman in the absence of the latter.

²⁰ The ramifications of such extended inquiry into union rules are far flung. It is entirely possible that the Board, in some future case, may be asked, on the basis of this decision, to determine the existence of a quorum at a particular union meeting or the validity of certain parliamentary procedure.

Decision and Order

109

Accordingly, as I can find no ground upon which to overturn the conclusion that Fowler was not in good standing at the time his clearance was refused in February, 1948, and as good standing was a contractual prerequisite to the granting of a clearance by the Respondent, I would find that Respondent's actions on that date were not in violation of the amended Act.

Signed at Washington, D. C.

Abe Murdock, Member
NATIONAL LABOR RELATIONS BOARD

110

111

112

APPENDIX A

NOTICE

TO ALL MEMBERS OF THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, AND TO ALL EMPLOYEES AND PROSPECTIVE EMPLOYEES OF THE A. H. BULL STEAMSHIP COMPANY

113

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause A. H. BULL STEAMSHIP COMPANY or its successors and assigns, to discriminate against Willard Christian Fowler or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

114

WE WILL NOT restrain or coerce employees or prospective employees of the A. H. BULL STEAMSHIP COMPANY, its successors or assigns, in their exercise of the right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso in Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

Appendix A Attached to Decision and Order

115

WE WILL notify in writing the A. H. BULL STEAMSHIP COMPANY that we withdraw our objections to the employment by it of Willard Christian Fowler and request it to offer him employment as a radio officer.

WE WILL notify Willard Christian Fowler that we have advised A. H. BULL STEAMSHIP COMPANY that we withdraw our objections to his employment and that we request it to offer him employment as a radio officer.

116

WE WILL make Willard Christian Fowler whole for any loss of pay suffered by him as the result of our having prevented his hire by A. H. BULL STEAMSHIP COMPANY.

THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION, AFL
(Union)

Dated _____ By _____
(Representative) (Title)

117

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material.

118

Intermediate Report and Recommended Order

IR-208

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF TRIAL EXAMINERS WASHINGTON, D. C.

Case No. 2-CB-91

119

In the Matter of
THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL

and

WILLARD CHRISTIAN FOWLER, an individual

Mr. Oscar Geltman, for the General Counsel.

120

Butter and Silverman, by *Mr. Abner H. Silverman*, of
New York, N. Y., for the Respondent.

Statement of the Case

Upon a charge filed June 18, 1948, by Willard Christian Fowler, an individual, the General Counsel for the National Labor Relations Board,¹ by the Regional Director for the Second Region (New York, New York), issued a

¹ The General Counsel and the staff-attorney appearing for him at the hearing are herein referred to as the General Counsel; the National Labor Relations Board is referred to as the Board.

Intermediate Report and Recommended Order

121

complaint dated March 2, 1950, alleging that the Radio Officers' Union of the Commercial Telegraphers Union, AFL, herein called the Respondent, had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A), Section 8 (b) (2), and Section 2 (6) and (7) of the National Labor Relations Act, as amended,² herein referred to as the Amended Act. Copies of the complaint and the charge were duly served upon the Respondent and Willard Christian Fowler.

122

With respect to the unfair labor practices, the complaint as amended at the hearing, alleges in substance: (1) that the Respondent is a labor organization within the meaning of the Amended Act; (2) that, in violation of Section 8 (b) (2) of the Amended Act, the Respondent on or about February 27, 1948, and also April 26, 1948, caused and/or attempted to cause the A. H. Bull Steamship Company (herein called the Company), to discriminate against Fowler, a prospective employee, in regard to hire or tenure of employment and other terms or conditions of employment, by demanding and requiring that the Company withdraw offers of employment which it had made to Fowler and by demanding and requiring that Fowler be refused employment by the Company; and (3) that, by these acts, the Respondent, in violation of Section 8 (b) (1) (A) of the Amended Act, also restrained and coerced employees or prospective employees of the Company in the exercise of the rights guaranteed by the Amended Act.

123

The Respondent filed an answer in which it denied the commission of the unfair labor practices alleged in the

² 61 Stat. 136.

124

Intermediate Report and Recommended Order

complaint, and, upon the amendment of the complaint at the hearing, amended its answer to deny the allegations of the amended complaint concerning the unfair labor practices.

125

Pursuant to notice, a hearing was held in New York City on April 3, 10, and 11, 1950, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues.

126

On the first day of the hearing and before any evidence was received, the undersigned granted a motion made by the General Counsel and opposed by the Respondent, to amend the complaint, which alleged the Respondent's commission of unfair labor practices on April 26, 1948, by adding allegations that the Respondent had also committed similar unfair labor practices on February 27, 1948.³ The undersigned thereupon also denied a motion made by the Respondent and opposed by the General Counsel, for "a few weeks" adjournment. However, upon the renewal of this motion by the Respondent at the close of the first day of the hearing (April 3), during which Fowler was the only witness, the undersigned granted a recess until April 10, 1950. The hearing was accordingly resumed on April 10 with further cross-examination of Fowler by counsel for the Respondent.

At the conclusion of the General Counsel's case, the undersigned denied the Respondent's motion to dismiss

³ The charge had included the alleged unfair labor practices on February 27 as well as those on April 26. Notice of the motion to amend the complaint had been served on the Respondent on March 31, 1950.

Intermediate Report and Recommended Order

127

the complaint on the ground that the evidence failed to sustain the allegations of the complaint. At the conclusion of the hearing, the Respondent renewed its motion to dismiss the complaint and the undersigned reserved decision. The motion is now disposed of in accordance with the considerations hereinafter set forth.

Before the hearing was closed, the General Counsel and the Respondent orally presented argument upon the issues. Since that time, the undersigned has received a brief from each of them.

128

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the Company

A. H. Bull Steamship Company, a New Jersey corporation with its principal office in New York City, is engaged in the operation of its own and chartered vessels for the water-carriage of cargo between States of the United States and between the United States and foreign countries. In 1948 and 1949, it operated an average of 23 vessels, and in each of these years, it transported articles and commodities of a value of more than \$5,000,000, in interstate and foreign commerce.

129

The undersigned finds that the Company is engaged in commerce within the meaning of the Amended Act.

II. The Respondent

The Radio Officers' Union of the Commercial Telegraphers Union, AFL, is a labor organization within the meaning of Section 2 (5) of the Amended Act.

130

Intermediate Report and Recommended Order

III. The unfair labor practices

A. *The contract and the general practices
in connection with hiring*

131

On January 11, 1947, the Respondent and various steamship companies, including the A. H. Bull Steamship Company, (herein called the Company), entered into a "Standard Dry Cargo and Passenger Ship Agreement" covering the companies' radio officers. It is undisputed that on this date, and also on August 16, 1947, the Respondent was designated as bargaining representative by a majority of the Company's radio officers, who constituted an appropriate unit for the purposes of collective bargaining. On August 16, 1947, the Respondent and the Company executed an agreement by which they extended the term of the general contract until August 15, 1948.

Among other things, the contract as thus extended, provided:

Article I—Employment

132

Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies.

• • • • •

Section 3. When a member of the Union in good standing qualified to fill the vacancy is not available, the Company will notify the Union twenty-four (24) hours in advance before a non-member of the Union is hired, and give the Union an opportunity to furnish

Intermediate Report and Recommended Order

133

without causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

• • • • •

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

134

Although the contract contained no reference to a hiring-hall arrangement, the companies generally requested the Respondent to furnish radio officers to fill vacancies. To meet these requests, the Respondent maintained a "shipping list" of its unemployed members in the order of the termination of their last employment. When a request for a radio officer was received from a company, the Respondent offered the assignment and requisite clearance to those of its unemployed members who were waiting for assignments in the Respondent's office, in the order in which their names appeared on the "shipping list." If a company's request were made appreciably in advance of the time the berth was to be filled, the Respondent through its secretary-treasurer, might advise an unemployed member who was high on the list to appear at the Respondent's office when the assignment was to be made. Otherwise, the assignments and clearances were given

135

136

Intermediate Report and Recommended Order

without previous announcement, to the longest unemployed member who happened to be in the Respondent's office waiting for a job.

137

While this appears to have been the general practice, Fred Howe, the Respondent's secretary-treasurer testified that on some few occasions, companies have asked that particular radio officers be assigned to them. In some of these instances, the Respondent refused the requests; in other instances, the Respondent honored the requests although, as Howe put it, "Some of the members don't think too much of that system."

B. The February incident

138

The claimant, Willard Christian Fowler, became a member of the Respondent on July 1, 1942, and continued to be a member throughout the events in February and April 1948, upon which the present case is based. From July 30, 1943 until January 2, 1948, he was continuously employed by the Company on three different ships. When he signed off the third ship on January 2, 1948 at New York City, the Company's headquarters, he returned to his home in Miami, Florida.

On December 29, 1947, Alexander Kozel, another member of the Respondent, was hired by the Company at New Orleans as radio officer of the *S. S. Frances*, to replace Radio Officer Lopez, who had fallen ill while the ship was in that port. On February 24, 1948, after the *Frances* had reached New York City at the end of its voyage, Robert H. Frey, the Company's radio supervisor, told Kozel that, although his services had been satisfactory, he was to be replaced by "a man with senior service in the company."

Intermediate Report and Recommended Order

139

On the same day, February 24, 1948, Frey telegraphed Fowler in Miami to "Proceed New York as soon as possible for position SS Frances." After verifying this offer by a long distance telephone call to Frey, Fowler came to New York City by airplane on Wednesday, February 25.

On Thursday, February 26, Fowler went to the Respondent's New York City office to pick up his mail. Although he then saw Secretary Howe of the Respondent, he did not speak to him since Howe was busy.

From the Respondent's office, Fowler went to the SS *Frances* at its berth in Brooklyn where he met Kozel on the ship. He told Kozel that he was "supposed to take the ship," as its radio officer, but in answer to Kozel's question, admitted that he did not have a clearance from the Respondent. Kozel replied, "Well, I am just packing my bags. But what does the Union say about it?" Explaining that he had not known that there was a radio officer on the ship, Fowler suggested that Kozel stay aboard, adding, "We will just wait until tomorrow and let you straighten it out with the Union. If you are going to stay on the ship, there is no sense in me sticking around. I will just forget about it." Fowler accordingly left the ship and went back to his hotel.

140

On the following day, Friday, February 27, Fowler returned to the ship. Kozel had left with his baggage, and Fowler stayed on the ship, cleaning and checking up on spare parts.

141

In the meantime, Kozel visited Secretary Howe of the Respondent and reported what had happened. At about 3 o'clock on Friday, Howe sent a telegram to Fowler on board the *Frances* and another telegram to Vice-president Kiggins of the Company.

142 *Intermediate Report and Recommended Order*

In his telegram to Fowler, Howe said:

You are hereby suspended from membership in the Radio Officers Union on grounds that you neglected to obtain clearance for your present job, also for depriving another member of his job stop Local Office of Seafarers International Union and Harry Lundeborg being notified of this action You may be reinstated to membership by complying with rules of this Union.

143

Howe's telegram to Vice-president Kiggins of the Company was the following:

This is to inform you that Willard C. Fowler is not in good standing in this organization on grounds that forcing another member out of employment is strictly against Union bylaws stop I again quote provisions of our agreement requiring a clearance for all such job (*sic*) Seafarers International Union local office and Harry Lundeborg being notified.

144

In justification of Howe's power as the Respondent's secretary-treasurer to suspend Fowler's membership by sending him this telegram, counsel for the Respondent points to the provisions of the Respondent's bylaws which authorize the Respondent's secretary-treasurer to act as General Chairman in all absences of the latter,* and which thus entrusts to the secretary-treasurer the following specific powers and duties of the General Chairman in connection with suspensions from membership:

* Article 7, Sec. 7.

Intermediate Report and Recommended Order

145

(1) Article 7, Sec. 1—to “see that the Constitution of the [Commercial Telegraphers’ Union], the by-laws, contracts and agreements of the [Respondent] are strictly enforced and adhered to, and . . . [to] call to account any officer or member violating these laws, contracts or agreements.”

(2) Article 7, Sec. 3—“with the consent of the General Committee, [to] suspend immediately any officer or member of the [Respondent], whose activities are such that the reputation and best interests of the [Respondent] are endangered, but such suspensions shall not deprive the officer or member of his rights as a member. The basis of such suspension shall, within thirty days, be prepared in the form of charges and served on the accused . . . , and the General Committee shall hear such charges as provided in Article 9, Section 4 of these by-laws.”

146

(3) Article 7, Sec. 6—To “interpret the by-laws of the [Respondent], and the [Commercial Telegraphers’ Union’s] Constitution on behalf of the [Respondent] with final decision resting with the International President of the [Commercial Telegraphers’ Union].”

147

(4) Article 17, Sec. 1—“Any member violating the by-laws of the [Respondent], the [Commercial Telegraphers’ Union’s] Constitution, the contracts and agreements held by the [Respondent], and in any way contributing to the lessening of respect for the laws, rules, contracts, and agreements of the [Respondent], and the good name

148 *Intermediate Report and Recommended Order*

of the [Respondent], shall first be advised by the Officer of the [Respondent] first having knowledge of the foregoing to correct his dereliction, and if such is persisted in and not abated, the member shall be immediately suspended by the General Chairman and have charges against him as provided in Article 7, Section 3 of these by-laws."

149 Upon receiving Howe's telegram, Fowler telephoned the Company's office late on Friday afternoon, and since Frey was not there, left word that Frey was to call him. As a result, Frey visited Fowler on the ship on Saturday morning, February 28, and Fowler showed him the telegram from Howe. At Frey's request, Fowler showed him his card from the Respondent which indicated that his dues were paid up. He also told Frey that Kozel had left the ship, but added, "If there is going to be any trouble over this, I will just return to Miami."

150 All of the findings of fact up to this point have been made upon uncontradicted evidence. It is also undisputed that neither Fowler nor Kozel thereafter served as the radio officer on the *Frances*, but that the berth was given to another member of the Respondent by the name of Miller on a "clearance" issued by Howe on Tuesday, March 2. How this came about, however, is a matter of dispute, for there are conflicts in the testimony as to relevant conversations between Howe and Frey and between Howe and Fowler, which occurred after Howe had dispatched the telegrams to Fowler and the Company on Friday, February 27, and before the Company accepted Miller as the radio officer for the *Frances* on Tuesday, March 2.

Intermediate Report and Recommended Order

151

Frey testified that he had two telephone conversations with Howe, the first on a call from Howe late Friday afternoon in which Howe accused him of "trying to run [his] own union" by replacing Kozel with Fowler, and the second on a call made by Frey to Howe on Saturday afternoon, in which Frey asked for a "clearance" for Fowler on the *Frances* since Kozel had left the ship and upon Howe's refusal, then said to Howe, "Very well. Send me another man."

Howe denied that he had any conversations with Frey in this matter or that he was asked by anybody for a "clearance" for Fowler. He testified that on Friday afternoon, February 27, he did receive a call from Williams, the Company's Captain of the Port, who upon being informed by Howe that Frey and Fowler were trying to "bump" Kozel, asked Howe to hold the matter in abeyance until Monday. According to Howe's testimony, he received a telephone call on Monday from either Captain Williams or Company Vice-president Kiggins telling him "to go ahead and fill the job." It was upon this request, according to Howe, that he gave the clearance for the job to Miller on Tuesday, March 2.

152

Fowler and Howe both testified concerning two conversations between them, the first on a telephone call from Fowler to Howe, and the second in Howe's office. Howe testified, however, that both of these conversations took place on Friday afternoon, February 27, after Fowler's receipt of Howe's telegram, while Fowler testified that he made the telephone call on Saturday afternoon, and the visit to Howe's office on the following Monday morning, March 1.

153

154

Intermediate Report and Recommended Order

Howe testified that in the telephone call, Fowler asked to see him and that in the resulting conversation in his office a short time later, Fowler told him that he wanted to work for the Bull Line, and that Howe then said there was no objection to Fowler's working for the Bull Line, but that there was no vacancy on a Bull Line ship "at the moment" since "Kozel [was] on the ship," and that neither Fowler nor anyone else would be allowed to "bump a man." Howe further testified that in this conversation,

155

Fowler agreed with Howe's argument that jobs with other steamship lines were equally acceptable but finally said that he would return to his home in Miami without taking any job. According to Howe, he then lifted Fowler's suspension, and, since he did not see or hear from Fowler again, he assumed that he had gone back to Miami.

Fowler, on the other hand, testified that in his telephone call to Howe, which he says was made on Saturday morning, he asked Howe for a "clearance" for the *Frances*, and that Howe said he would not be given any clearances in the future for the *Frances* or for any other ship of the Company because he had tried to steal jobs from other members of the Respondent. Fowler further testified that in his conversation with Howe in the latter's office on Monday, March 1, Howe berated him for "trying to break the union" by going to the *Frances* without first getting a "clearance," and by thus knocking another member out of a job; that Howe told him that, "as far as the Bull Line is concerned, you are through"; and that Howe finally suggested that Fowler, "to straighten [himself] out," might take other available jobs, whereupon Fowler replied, "Well, there has been a big misunderstanding and I seem to be right in the middle of it. In that case,

156

Intermediate Report and Recommended Order

157

I will go back to Miami and forget about the whole thing." According to Fowler, however, he told Howe of his intention to stay on the *Frances* that night and then to leave for home in "a couple of days."

Fowler did stay on the *Frances* that night and consequently met Miller when he reported at the ship the next morning. Fowler testified, and Howe denied, that Fowler telephoned a protest to Howe the same morning because, as he testified he told Howe, Miller had a license which was only a month old,⁵ and that Howe retorted to Fowler "that is no concern of yours so just forget about it."

158

The undersigned credits the testimony of Frey and Fowler as to their conversations with Howe and finds specifically (1) that on Saturday afternoon, February 28, Frey in a telephone call to Howe, asked Howe for a clearance for Fowler on the *Frances* since Kozel had left the ship; (2) that Howe refused the clearance and that Frey then asked that another man be sent to fill the job; and (3) that, in a telephone conversation on Saturday, February 28, and again in a conversation in Howe's office on Monday, March 1, Howe told Fowler that he would not be given clearances for the Company's ships because he had tried to "bump" a fellow member and had sought a job directly from the Company without first getting a clearance from the Respondent.

159

C. The April incident

In a letter dated March 25, 1948, Secretary Howe acknowledged receipt of Fowler's payment of dues for the

⁵ It appears from the record that Fowler was mistaken as to this, since Miller's license had been renewed a month before.

160

Intermediate Report and Recommended Order

second quarter of 1948. In the course of the letter, Howe told Fowler:

161

Your name is on the waiting list here for jobs and we shall be pleased to offer you the best we have. I am sure you will enjoy and benefit by a change of companies. Your name will be sufficiently high on the list so that you can obtain a good assignment without waiting for more than a day or two, and this only so you may select the type of ship you desire.

On Thursday, April 22, Fowler returned to New York City and on the following day he telephoned to Frey and told him that he was back in town. Frey said that Fowler should keep in touch with him and that something might turn up in the next few days.

162

Fowler testified that he visited Howe at the Respondent's office on Saturday, April 24; that he told Howe he had come to New York in accordance with Howe's letter of March 25; that, although Fowler made no mention of the possibility of getting a job with the Company, Howe said, "We have plenty of jobs available for you but it still stands as far as the Bull Line is concerned; you will be given no clearance for any Bull Line ship"; that Fowler insisted that there was nothing in the Respondent's constitution or bylaws which deprived him of a choice of ship or employer; that Howe replied that that was so "as far as any other company is concerned; but you will be given no clearance for any ships of the Bull Line"; that Howe also said, "Frey has been talking too much to you down there and making a company stiff out of you. I am going to break it up right here and now. All the old Bull Line

Intermediate Report and Recommended Order

163

stiffs will not be given any clearance at any future time"; that Fowler told Howe he would be back to the Respondent's office early the following week; and that, before Fowler left the office, Howe called his assistant, Joseph Glynn, into the conversation and said, "I want you to witness the fact that I am offering Mr. Fowler a job." Glynn and Howe denied that they saw Fowler on this occasion or had the conversation just outlined. Howe denied that he saw Fowler at any time during April. The undersigned, however, credits Fowler's testimony and finds specifically that on Saturday, April 24, Howe told Fowler that there were plenty of jobs available for Fowler but that he would receive no clearance for a job on any ship of the Company.

164

On Monday morning, April 26, Fowler reported at the Respondent's office and bid for, and received, a clearance from Glynn for a job as radio officer on the *SS Raphael Semmes* of the Waterman Steamship Lines. He told Glynn, however, that he would take a look at the ship. When he did so that morning, he decided not to take the berth.

On the same morning, Monday, April 26, Frey called the Respondent's office by telephone and spoke with Glynn. Frey testified that he asked Glynn whether Fowler was at the Respondent's office or, if not, where he could reach Fowler because he wanted to get a clearance for him as radio officer on the Company's *SS Evelyn*; that Glynn replied that "he would see"; and that this was the full conversation between them. Glynn testified that Frey asked, "Have you seen Fowler around?" and that, upon Glynn's telling him that Fowler had just left for an assignment to a Waterman Lines ship, Frey said, "Oh, I see, Thank you, very much," and hung up. The undersigned credits Frey's testimony concerning this conversation.

165

Intermediate Report and Recommended Order

At about noon of the same day, after Fowler had visited the *Raphael Semmes* and decided not to take the berth on that ship, he went to the Company's office and saw Frey, who told him that he had a job for Fowler on the *SS Evelyn* if Fowler could get a clearance from the Respondent.

After leaving Frey's office, Fowler telephoned to Howe. Fowler testified that, by mistake, he addressed Howe as "Mr. Frey"; that Howe said, "You are getting your wires crossed. Fowler, what are you doing at the God damn Bull Line?"; that, upon this unexpected turn to the conversation, Fowler never did tell Howe of Frey's specific job-offer; but that, in an ensuing argument as to whether Fowler was trying to "steal jobs" from other members of the Respondent, Howe said, "As far as I am concerned, you are through," and suggested that Fowler join a rival telegraphers' union in an attempt to get a job. Howe denied that this was the conversation. He testified that Fowler told him that he would like to work for the Bull Line and that Howe replied, "How are you going to work for the Bull Line when I don't have any Bull Line ships today?" The undersigned credits Fowler's testimony concerning this conversation.

Frey testified that late on the same day, Monday, April 26, he had a telephone conversation with Howe, but that he could not recall whether he called Howe or Howe called him as a result of Frey's morning conversation with Glynn. In either event, according to Frey, Howe told him that he would not give Fowler a clearance for the *Evelyn* or for any other ship of the Company, whereupon Frey asked Howe to assign another man. Glynn testified that he received a telephoned request on *Tuesday, April 27*, from either Frey or Captain Williams for the assignment

Intermediate Report and Recommended Order

169

of a man to the *Evelyn* and that no mention was made of Fowler. Howe testified that he himself received no request for an assignment to the *Evelyn*, that he knew of the vacancy only through Glynn's report to him, and that he issued a clearance to a radio officer by the name of Paese on the morning of April 27.

The undersigned, however, credits the testimony of Frey that he asked Howe on Monday, April 26, for a clearance for Fowler for the *Evelyn* and that Howe then told him that the Respondent would not clear Fowler for the *Evelyn* or for any other ship of the Company. 170

After Howe had thus rejected Frey's request, Fowler called Frey and told him that he could not get a clearance for any of the Company's ships. Frey said he was sorry but that he could not give Fowler the job without an official clearance from the Respondent.

D. Conclusions

1. Summary of the facts

The material facts already found are relatively few but a brief review of their salient elements will afford a clearer view of the problems they present. 171

On August 16, 1947, the Company and the Respondent agreed in writing to extend for the period of a year, their existing contract which reserved to the Company "the right of free selection of all its Radio Officers," but also provided for the preferential hiring of members of the Respondent in good standing and for the Respondent's granting all "necessary 'clearances'" to all its members in such standing. Although at times the Respondent honored requests of steamship companies for clearance for the hire

172

Intermediate Report and Recommended Order

of specific members of the Respondent, it did so reluctantly, preferring to have the companies notify the Respondent merely of their needs, as most of them did, and to permit the Respondent to select and assign its members to the jobs in the order of their length of unemployment. This "hiring hall" practice, which was generally followed and which the Respondent favored, was not referred to in its contract with the Company.

173

On February 24, 1948, and again on April 26, 1948, at which times Fowler was a member of the Respondent in good standing, the Company offered Fowler directly, and Fowler accepted, a job as radio officer on one of the Company's ships, without first informing the Respondent or requesting a clearance. Learning of the February arrangements from Kozel, a member of the Respondent, whom Fowler was to replace, Secretary-treasurer Howe of the Respondent sent telegrams to Fowler and the Company on February 27, notifying them in substance that Fowler had been suspended from membership for violation of the Respondent's rules in neglecting to obtain the clearance necessary under the contract, and in depriving another member of his job. No steps to suspend or expel Fowler from membership were taken in the April incident. During both the February and April incidents, however, Howe, as agent for the Respondent, refused specific requests of the Company on February 28 and April 26, 1948, respectively, for clearances of Fowler, which would have permitted the Company to hire him in accordance with their direct arrangements. As a result, the Company did not hire Fowler, and the jobs were filled by the Respondent's assignment of other members.

174

Intermediate Report and Recommended Order

175

2. The violation of Section 8 (b) (1) (A)
of the Amended Act

Under the Respondent's contract with the Company, the Company was obligated to hire only members of the Respondent "in good standing whenever they were available, and the Respondent, in turn, was required "to grant all members in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned." In view of these provisions and upon the other evidence in the case, the undersigned finds that, by refusing the Company's requests for the necessary clearances for Fowler on February 28 and April 26, 1948, the Respondent prevented, and intended to prevent, the Company's hire of Fowler (1) because it disapproved the selection and direct hire of radio officers by steamship companies and was seeking to establish instead as the exclusive method of hire, the practice under which the companies permitted the Respondent to select and assign its members to jobs in the order of their length of unemployment; and (2) because, in the February incident, Fowler's hire by the Company would have displaced Kozel, another member of the Respondent whose services had been admittedly satisfactory to the Company. The undersigned finds that the Respondent thus blocked Fowler's employment by the Company in order to enforce against him as one of its members, the rules of fair dealing between its members it had prescribed for their mutual benefit.

176

177

Briefly stated, these rules required the Respondent's members to look to the Respondent rather than to the companies for job assignments, and to abstain from seeking or entertaining offers of jobs directly from the companies, particularly when their acceptance would result in the

178

Intermediate Report and Recommended Order

179

"bumping" of fellow members. In their general, common observance of these rules, the Respondent's members have undoubtedly engaged in a form of "concerted activity" for their "mutual aid or protection," which has been protected both by Section 7 of the original National Labor Relations Act (herein referred to as the Wagner Act), and by Section 7 of the Amended Act, which became effective on August 23, 1947.⁶ However, under the Board's interpretation⁷ of Section 7 of the Wagner Act and under the express language of Section 7 of the Amended Act, applicants for employment like Fowler,⁸ as well as employees, have also been protected in the right to refrain from such concerted activities except to the extent that the right to refrain may be affected either by a lawful agreement between an employer and a labor organization requiring membership in the labor organization as a condition of employment, or by the proviso to Section 8 (b) (1) (A) of the Amended Act which preserves "the right

180

⁶ The following, full provisions of Section 7 of the Amended Act changed Section 7 of the Wagner Act only by adding the language which is italicized:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*

⁷ *Colonie Fibre Company*, 71 NLRB 354, 355-356, enf'd 163 F. 2d 65 (C. A. 2). A similar view was expressed by Senator Taft in the debates preceding the passage of the Amended Act. 93 Cong. Rec. 7000.

⁸ The rights guaranteed to employees extend also to applicants for employment. *Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177.

Intermediate Report and Recommended Order

181

of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Therefore, unless justification for its action be found either in the Respondent's contract with the Company or in this statutory proviso, the Respondent by preventing Fowler's hire by the Company, improperly restrained and coerced him in the exercise of a right to refrain from the concerted activities of his fellow union members.

The General Counsel and the Respondent agree, and the undersigned finds, that the already-quoted provisions of this contract for the preferential hiring of members of the Respondent, were valid under the proviso to Section 8 (3) of the Wagner Act and that, having been extended for a year by the parties before the effective date of the Amended Act, their legality and effectiveness were preserved for that period by the savings clause in Section 102 of the Amended Act.⁹

182

The contract unquestionably made "membership in good standing" a condition of employment by the Company

⁹ Section 102 reads:

183

* * * the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto. (Emphasis supplied.)

See *Public Service Company of Colorado*, 89 NLRB No. 51; *Daniel Hamm Drayage Company, Inc.*, 84 NLRB No. 56.

184

Intermediate Report and Recommended Order

185

whenever members of the Respondent were available for hire. If, therefore, Secretary-Treasurer Howe's purported "suspension" of Fowler's membership on February 27 were effective under the Respondent's by-laws, Fowler would not have been a member in good standing, and the Respondent would have been justified under the contract in refusing the Company's request for a clearance for him during the February incident. The undersigned, however, agrees with the General Counsel that Howe's action did not constitute a valid suspension of Fowler's membership under the Respondent's pertinent by-laws, which have already been quoted. For, according to Article 7, Section 3 of these by-laws, immediate suspension from membership may be effected by the Secretary-Treasurer or the General Chairman only with the consent of the General Committee, which was lacking in the present case. And, according to Article 17, Section 1, suspension without the consent of the General Committee may be ordered only *after* warning to the rule-offender and a continuation by him of his infraction. These elements, too, were absent in the present case. The undersigned concludes that Fowler was not validly suspended from membership and that the Respondent was therefore not justified by the contract in refusing him a clearance in February on the ground that he was not then a member of the Respondent in good standing.

186

Nor can there be found in the contract any other basis for justifying the Respondent's refusal to grant Fowler clearances in either the February or the April incident, when Fowler was admittedly a member in good standing. On the contrary, the contract *required* the Respondent to issue these clearances. For it expressly provided that the

Intermediate Report and Recommended Order

187

Company was to have "the right of free selection of all its Radio Officers," and that the Respondent was "to grant all members in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned."

Furthermore, the Respondent's refusals to issue clearances for Fowler were based upon his violation of its rules against "bumping" and direct hire by steamship companies, whereas the contract made "membership in good standing" the only condition of employment by the Company. That the contract did not also condition hire upon selection and assignment by the Respondent, is made clear not only by its reservation to the Company of "the right of free selection," but also by its provision¹⁰ requiring the Company to give the Respondent 24 hours notice of the unavailability of members before hiring a non-member. No occasion for such a notice would arise until, and unless, the Company had first directly and unsuccessfully sought to hire members of the Respondent.

188

Upon these circumstances, the undersigned finds that the contract required the Respondent to issue clearances for Fowler as a member in good standing. Certainly it imposed no obligation upon the Company to hire through the Respondent or to permit the Respondent to select its radio officers from among the Respondent's members in accordance with any rule that the Respondent deemed fair as between its competing members. Nor did it create any restriction upon the normal right of the Respondent's members to seek or accept employment directly from the Company. On the contrary, this restriction, which the Respondent enforced against Fowler by withholding clearances

189

¹⁰ Article I, Section 3, quoted above at p. 3.

190

Intermediate Report and Recommended Order.

191

for him in the present case, was incompatible with the contractually recognized rights of direct hire and acceptance of the Company and the members for whom the Respondent made the contract. It was therefore clearly a rule independently established by the Respondent for the governance of its members, and entirely without sanction or support from the contract. The undersigned therefore concludes that the Respondent was not justified by the contract in refusing clearances for Fowler on February 28 and April 26, 1948, because of his violation of the Respondent's restrictive rules.

192

Finally, the undersigned is of the opinion that the Respondent's refusals of clearance for Fowler were not protected by the preservation in the proviso to Section 8 (b) (1) (A) of the Amended Act, of "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." This proviso permits a union to enforce whatever rules it may prescribe and thus, incidentally, to require the participation of its members in particular concerted activities, only to the extent that penalties for infractions of the rules may affect "acquisition or retention of membership." It does not, however, reserve to a union the right to enforce its rules concerning the concerted activities of its members by causing an employer to refuse to hire or to discharge an offending member, as the Respondent did in the present case.

Upon the foregoing considerations, the undersigned concludes (1) that, in preventing Fowler's hire by the Company on February 28 and April 26, 1948, because of his acceptance of direct offers of employment in violation of the Respondent's rules, the Respondent caused the Com-

Intermediate Report and Recommended Order

193

pany to withdraw its offers, and Fowler to lose the employment; (2) that the Respondent thereby penalized Fowler for his refusal to engage in the concerted activities which the Respondent had prescribed for its members; (3) that neither the contract between the Respondent and the Company nor the proviso to Section 8 (b) (1) (A) of the Amended Act justified this conduct of the Respondent; and (4) that the Respondent, in violation of Section 8 (b) (1) (A) of the Amended Act, thereby restrained and coerced the Company's employees and prospective employees (including Fowler) in the exercise of their right under Section 7 of the Amended Act to refrain from engaging in the concerted activities prescribed by the Respondent's rules.

194

3. The violation of Section 8 (b) (2)
of the Amended Act

There remains for consideration the question of whether, as the complaint alleges, the Respondent violated Section 8 (b) (2) as well as Section 8 (b) (1) (A) of the Amended Act.

The portion of Section 8 (b) (2), upon which the General Counsel relies, makes it an unfair labor practice for a labor organization—

195

To cause or attempt to cause an employer to discriminate against an employee in violation of [section 8 (a) (3)] . . .

Section 8 (a) (3) of the Amended Act, to which reference is thus made in Section 8 (b) (2), makes it an unfair labor practice for an employer—

196

Intermediate Report and Recommended Order

By discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage or discourage membership in any labor organization . . .*¹¹ (Emphasis supplied.)

197

The undersigned has already found that, by refusing the Company's requests for clearances for Fowler on February 28 and April 26, 1948, the Respondent caused the Company to withdraw its offers of employment which it had made to Fowler. The General Counsel contends that the Respondent, in violation of Section 8 (b) (2) of the Amended Act, thereby caused the Company, as an employer, to violate Section 8 (a) (3) of the Amended Act, by discriminating against Fowler as a prospective employee, in regard to his hire, tenure, and conditions of employment, thereby *encouraging membership* in the Respondent-labor organization. The Respondent, however, argues that the "discrimination" forbidden by both the Wagner Act and the Amended Act, is discrimination based upon membership or nonmembership in a particular union; that no such discrimination appears in the present case; and that, in any event, the acts of the Respondent and the Company *adversely* affecting Fowler cannot be regarded as *encouraging membership* in the Respondent, since Fowler was one of its members.

198

Contrary to the first two of these arguments of the Respondent, neither the Wagner Act nor the Amended Act limited its prohibitions to discrimination based upon mem-

¹¹ Both Section 8 (3) of the Wagner Act and Section 8 (a) (3) of the Amended Act contain this identical language. They differ only in their respective provisos dealing with the permissible types of union security contracts and the extent to which such contracts are defenses to charges of discrimination.

bership or nonmembership in a union. The discriminating forbidden was, and is, discrimination "to encourage or discourage membership in any labor organization." Thus, any discrimination in regard to hire, tenure, or the terms or conditions of employment, whether based on membership, nonmembership, or any other ground, is prohibited if it has the effect of encouraging or discouraging membership in a labor organization.

That the Respondent caused the Company to discriminate against Fowler in regard to his hire, is clear. Although the discrimination was not based upon Fowler's membership or nonmembership in any labor organization, it was discrimination against him because he, unlike other members of the Respondent, was refusing to obey the Respondent's rules. If, therefore, this discrimination encouraged membership in the Respondent, the Respondent violated Section 8 (b) (2) of the Amended Act.

200

The normal effect of the discrimination against Fowler was to enforce not only his obedience as a member, of such rules as the Respondent might prescribe, but also the obedience of all his fellow members. It thereby strengthened the Respondent both in its control of its members for their general, mutual advantage, and in its dealings with their employers as their representative. It thus encouraged non-members to join it as a strong organization whose favor and help was to be sought and whose opposition was to be avoided. In its effect upon nonmembers alone, it must therefore be regarded as encouraging membership in the Respondent.

201

Finally, by its demonstration of the Respondent's strength, the discrimination in the present case also had the normal effect of encouraging Fowler and other mem-

202

Intermediate Report and Recommended Order

bers to retain their membership in the Respondent either through fear of the consequences of dropping out of membership or through hope of advantage in staying in.

203

Upon these considerations, the undersigned concludes that, by its refusals to issue clearances for Fowler which caused the Company to withdraw its offers of employment on February 28 and April 26, 1948, the Respondent, in violation of Section 8 (b) (2) of the Amended Act, also caused the Company, as an employer, to violate Section 8 (a) (3) of the Amended Act, by discriminating against Fowler as a prospective employee, in regard to his hire, tenure, and conditions of employment, thereby encouraging membership in the Respondent-labor organization.

IV. The effect of the unfair labor practices upon commerce

204

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Company described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Since it has been found that the Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Amended Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Amended Act.

The undersigned has found that, in violating both Section 8 (b) (1) (A) and Section 8 (b) (2) of the Amended

Intermediate Report and Recommended Order

205

Act, the Respondent objected to, and prevented, the Company's hire of Fowler, thereby causing Fowler to lose employment by the Company. Accordingly, it will be recommended (1) that the Respondent notify the Company in writing, and furnish a copy of the notice to Fowler, that it has withdrawn its objections to the employment of Fowler by the Company and requests the Company to offer Fowler employment as a radio officer; and (2) that the Respondent make Fowler whole for any loss of pay he may have suffered by reason of the Respondent's preventing his hire by the Company on February 28, 1948 and April 26, 1948, according to the following formula:¹²

206

Fowler's loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof from February 28, 1948 to the date of the Company's offer of employment to him as a radio officer, or to the date on which the Respondent serves its notice upon the Company of its withdrawal of objections to Fowler's employment, whichever shall first occur. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Fowler would normally have earned for each such quarter or portion thereof, his net earnings,¹³ if any, in other em-

207

¹² See *F. W. Woolworth Company*, 90 NLRB No. 41.

¹³ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by Fowler in connection with obtaining work and working elsewhere than for the Company, which would not have been incurred but for the Respondent's preventing his employment by the Company. See *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, County, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

208 *Intermediate Report and Recommended Order*

ployment during that period. Earnings in one particular quarter shall have no effect upon the Respondent's liability for any other quarter.

Upon the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

- 209 1. A. H. Bull Steamship Company, a New Jersey corporation, is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Amended Act.
2. The Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, is a labor organization within the meaning of Section 2 (5) of the Amended Act.
- 210 3. By restraining and coercing employees and prospective employees in the exercise of a right guaranteed in Section 7 of the Amended Act, the Respondent did engage in and has continued to engage in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Amended Act.
4. By causing A. H. Bull Steamship Company, an employer, to discriminate against a prospective employee in violation of Section 8 (a) (3) of the Amended Act, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Amended Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Amended Act.

Intermediate Report and Recommended Order

211

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned hereby recommends that the Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, its officers and agents, shall:

1. Cease and desist from:

(a) Restraining or coercing employees or prospective employees of A. H. Bull Steamship Company, its successors or assigns, in the exercise of their right to refrain from any or all of the concerted activities listed in Section 7 of the Amended Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A) or by an agreement requiring membership in the Respondent as a condition of employment as authorized in Section 8 (a) (3) of the Amended Act.

212

(b) Causing or attempting to cause A. H. Bull Steamship Company or any other employer, to discriminate against an employee or prospective employee in violation of Section 8 (a) (3) of the Amended Act.

213

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Amended Act:

(a) Notify the A. H. Bull Steamship Company in writing, and furnish a copy to Willard Christian Fowler, that it has withdrawn its objections to the employment of Fowler by the Company and requests the Company to offer Fowler employment as a radio officer.

214

Intermediate Report and Recommended Order

(b) Make whole Willard Christian Fowler, in the manner set forth in the section entitled, "The remedy," for any loss of pay he may have suffered as a result of the Respondent's having prevented his hire by the A. H. Bull Steamship Company.

215

(c) Post copies of the notice attached to this Report as Appendix A, in conspicuous places at its business office in New York City, where notices to members are customarily posted. Copies of the notice, to be furnished by the Regional Director of the Second Region as the agent of the Board, should be posted by the Respondent immediately upon their receipt, after being duly signed by an official representative of the Respondent, and should be maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material.

216

(d) Notify the Regional Director for the Second Region in writing within twenty (20) days from the receipt of this Intermediate Report, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless the Respondent shall, within twenty (20) days from the receipt of this Intermediate Report, notify the Regional Director for the Second Region in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the

Intermediate Report and Recommended Order

217

Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

218

219

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this day of July 1950.

(Signed) WILLIAM F. SCHARNIKOW
William F. Scharnikow
Trial Examiner

220

APPENDIX A

NOTICE

TO ALL MEMBERS OF THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, AND TO ALL EMPLOYEES AND PROSPECTIVE EMPLOYEES OF THE A. H. BULL STEAMSHIP COMPANY

221

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

222

WE WILL NOT restrain or coerce employees or prospective employees of the A. H. BULL STEAMSHIP COMPANY, its successors or assigns, in their exercise of the right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause A. H. BULL STEAMSHIP COMPANY or any other employer, to discriminate against an employee or prospective employee in violation of Section 8 (a) (3) of the Act.

*Appendix A Attached to Intermediate Report
and Recommended Order*

223

WE WILL notify the A. H. BULL STEAMSHIP COMPANY that we have withdrawn our objections to the employment by it of Willard Christian Fowler and request it to offer him employment as a radio officer.

WE WILL make Willard Christian Fowler whole for any loss of pay suffered by him as the result of our having prevented his hire by the A. H. BULL STEAMSHIP COMPANY.

224

THE RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS UNION,
AFL

Dated By
(Representative) (Title)

225

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material.

226

**Stenographic Transcript of Testimony at Hearing of
April 3, 1950**

[1] **BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

 Second Region

 Case No. 2-CB-91

227

In the Matter of

THE RADIO OFFICERS' UNION OF THE COMMER-
CIAL TELEGRAPHERS UNION, AFL.,

 and

WILLARD CHRISTIAN FOWLER, an Individual.

2 Park Avenue
New York, N. Y.
Monday April 3, 1950

228

Before: William F. Scharnikow, Trial Examiner.

Appearances:

Oscar Geltman, Esq., Counsel for General Counsel.

Butter & Silverman, Esqs., 401 Broadway, New York,
N. Y.

By: Abner H. Silverman, Esq., appearing for respondent Union.

Stenographic Transcript of Testimony at Hearing of 229
April 3, 1950

[5] Mr. Geltman: I offer in evidence as General Counsel's Exhibit documents which have been marked for identification as follows:

As Exhibit 1-A, the original charge herein filed June 18, 1948;

.

[6] As General Counsel's Exhibit 1-D, the complaint herein issued March 2, 1950;

.

As General Counsel's Exhibit 1-F, the answer of the respondent herein;

.

As General Counsel's Exhibit 1-H, a notice of motion to amend complaint with a copy received by Butter & Silverman endorsed thereon and with an affidavit of service attached thereto showing service upon the respondent herein, both services having been made on March 31, 1950.

I offer these in evidence.

.

[7] Trial Examiner Scharnikow: General Counsel's Exhibits for identification 1-A through 1-H are admitted in evidence.

(The documents previously marked General Counsel's Exhibits 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, and 1-H for identification were received in evidence.)

Mr. Geltman: At this time I move to amend the complaint as set out in Exhibit 1-H, the amendment being the incorporation of an additional date when a wrong is alleged.

232 *Stenographic Transcript of Testimony at Hearing of
April 3, 1950*

The complaint as originally issued alleged that by events which took place on or about April 26, 1948, the respondent violated certain sections of the National Labor Relations Act.

As amended, the complaint would allege that by two different events, one of which took place on or about February 27, 1948, and also by a separate event which took place on or about April 26, 1948, the respondent violated those same sections.

• • • • •

[9] Mr. Silverman: Mr. Trial Examiner, we oppose the amendment of the complaint.

We particularly oppose it at this time.

• • • • •

[21] Trial Examiner Scharnikow: I have two motions before me: One, a motion to amend the complaint, which you oppose, and then in the event I should permit the amendment to the complaint, a motion for an adjournment.

• • • • •

234 [23] Trial Examiner Scharnikow: I am pretty clear on the motion to amend.

I am going to grant the motion to amend the complaint.

• • • • •

[25] Trial Examiner Scharnikow: At the present time I will deny the motion for adjournment without prejudice to its renewal when, as and if it appears to you that there is concrete indication of any prejudice to you in the continuation of the hearing.

You may proceed.

Mr. Geltman: Although, Mr. Trial Examiner, there is no charge against A. H. Bull Steamship Company, the

*Stenographic Transcript of Testimony at Hearing of
April 3, 1950*

235

employer here, whom General Counsel alleges the union caused to refuse to take the charging party as an employee, it will be necessary to show the employer is in interstate commerce for the Board's purposes, and I have spoken to Mr. Silverman and he has agreed [26] that the facts set out in a letter to me dated March 21, 1950 and signed W. A. Kiggins, Jr., vice president of A. H. Bull & Company, are true.

I offer that letter in evidence as General Counsel's Exhibit No. 2.

236

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 2 for identification.)

Trial Examiner Scharnikow: I take it from the statement of counsel the facts in this letter may be regarded as true?

Mr. Silverman: Yes, sir.

Trial Examiner Scharnikow: You have no objection?

Mr. Silverman: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 2 is admitted in evidence.

237

(The document previously marked General Counsel's Exhibit 2 for identification was received in evidence.)

Mr. Geltman: As to the issue as to whether the respondent is a labor organization, I am confident that Mr. Silverman will so stipulate.

Mr. Silverman: I am prepared to so stipulate.

Trial Examiner Scharnikow: The stipulation is accepted.

• • • • •

238

Willard C. Fowler, for Board, Direct

[27] WILLARD C. FOWLER (Board Witness)

Direct Examination:

Q. (By Mr. Geltman) . . .

.

Q. Mr. Fowler, you have worked for the A. H. Bull Steamship Company, haven't you? A. Yes, sir.

239

Q. How long did you work for them? A. Previous to the February incident, it was from July '43 until January '48.

Q. You mean July 1943 until January 1948? A. That is correct.

Q. What did you do? A. I was a radio operator.

Q. On ships of the company? A. That's right.

Q. On one ship or more than one ship during that period? A. No. I was on three ships during that period.

Q. You might as well tell us the names of the ships. A. The first ship was the Nathaniel Macon; the second ship was the S. S. Marjorie; and the third ship was the S. S. Hilton.

240

[28] Q. Did you work for any other companies in between? A. No, sir.

Q. Was that pretty continuous? A. Yes, sir, it was continuous.

Q. What is the last day you worked for the A. H. Bull Steamship Company? A. January 2, 1948.

Q. That was when you left the Hilton? A. That is when I left the Hilton.

Q. You are a licensed radio operator, aren't you? A. That's right.

.

Willard C. Fowler, for Board, Direct

241

Q. After you left the job on the Hilton, where were you?
A. I went to my home in Miami, Florida.

Mr. Geltman: Mr. Reporter, will you mark this for identification General Counsel's Exhibit 3.

(Thereupon the document above-referred to was marked General Counsel's Exhibit 3 for identification.)

Q. (By Mr. Geltman) Will you look at this paper, please, and tell me what it is?

242

.

[29] A. (Witness examines document.)

This is a telegram I received from the Bull Steamship Company on February the 24th, 1948.

Mr. Geltman: I offer it in evidence.

.

Trial Examiner Scharnikow: General Counsel's Exhibit 3 is admitted in evidence.

243

(The document previously marked General Counsel's Exhibit 3 for identification was received in evidence.)

Q. After you received this telegram, General Counsel's Exhibit 3, did you communicate with A. H. Bull Steamship Company? A. Yes, that date that I received it, as soon as I received it—the telegram—I called the Bull Steamship Company long distance to verify the telegram and state that I was coming north, that I was available for the job, and that I was coming north to take it.

244

Willard C. Fowler, for Board, Direct

Q. Whom did you speak to? A. I spoke to Mr. Frey.

.

[30] Q. (By Mr. Geltman) Who is Mr. Frey, Mr. Fowler? A. Mr. Frey is the radio supervisor for the A. H. Bull Steamship Company. He handles the radio—he handles the employment of radio personnel that is given clearance through the union to work on particular ships of the Bull line or any other particular ship of the Bull line.

245

Q. Had you received other positions through Mr. Frey? A. Yes, sir.

Q. After you called Mr. Frey, what did you do? A. I—the following day I bought a plane ticket and came north. That was the 25th.

.

[31] Mr. Geltman: For the record, may I state that the 24th of February 1948, was a Tuesday, the 25th, of course, Wednesday.

Q. (By Mr. Geltman) That is your testimony, that you left by plane on the 25th; is that right? A. On the 25th, that's right.

246

Q. When did you get to New York? A. I arrived late that night on the 25th.

Q. What did you do then? A. When I arrived in New York, I went to a hotel and stayed at the hotel until about 11 o'clock the following morning, which was Thursday.

Q. And then? A. After I left the hotel, about 11 o'clock, I went to the union office to see if I had any mail or—and I had—I knew I had some mail before I left, not from my home but from other points.

Q. When you say the union office, you mean the Radio

Officers' Union office? A. The Radio Officers' Union Office at 1440 Broadway.

Q. Yes? A. And I went into the union office to see—and looked in the mail box.

And I saw Mr. Howe there but he was busy at the time and I didn't stop. I left the office and went back to the hotel.

[32] Q. Who is Mr. Howe? A. Mr. Howe was secretary-treasurer of the Radio Officers' Union.

And from that point I called the Bull Steamship Company to find out the location of the S. S. Francis which they gave me.

248

.

Q. Where was the ship? A. The ship was at Pier 19, Brooklyn.

And when I came on board the ship, I went to the radio room and I found that the operator that had just made the previous voyage was still on the ship.

Q. Did you have any conversation with him? A. Yes. I had a conversation with him.

I says that I was supposed to take the ship.

And he says, "Did you get a clearance?"

And I says, "No, not yet."

249

[33] And he says, "Well, I am just packing my bags," he said, "But what does the union say about it?"

"Well," I says, "I don't know." I says, "I didn't know there was even a man on the ship."

Then I asked him, I says, "Are you going to stay on?"

"Well," he says, "I don't know."

I says, "Well, in that case, being I didn't know there was a man on the ship," I says, "You have your bags and so on here," I says, "We will just wait until tomorrow and let you straighten it out with the union", and I says, "If you

250

Willard C. Fowler, for Board, Direct

are going to stay on the ship, there is no sense in me sticking around. I will just forget about it."

I says, "They are not going to hire two radio operators."

So, there was some other conversation, didn't amount to anything. The main object was we decided—I told him I was going back to the hotel and that he was to stay on the ship that night.

Q. Did you go back to the ship that following day? A. Yes, I went back to the ship the following day about noon.

251

Q. That would be Friday? A. That would be Friday.

Q. Friday, the 27th of February? A. 27th of February.

And when I came on that ship, I went directly to the [34] radio room and the man had taken all his baggage off.

And I went to the mate on watch and asked him if he had any information about the man staying on. And he said, "No," he said, "He said he was leaving and he took all his baggage off.

I don't know what time he took it off, but he said he saw him take it off. And there was no baggage in the radio room or in his quarters at that time. That was about noon Friday.

252

Q. Did you go anywhere? Did you stay there? A. I stayed on the ship the rest of the afternoon cleaning up and checking spare parts and so on. And along about—oh, I would say four-thirty, five o'clock, I received a telegram from the Radio Officers' Union.

Mr. Geltman: Mr. Reporter, will you mark this for identification, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Willard C. Fowler, for Board, Direct

253

Q. (By Mr. Geltman) Look at this paper marked General Counsel's Exhibit 4 for identification and tell me what that is, please? A. This is the telegram that I received from the Radio Officers' Union signed by Mr. Fred M. Howe. And I received this telegram about four-thirty—between four-thirty and five o'clock that Friday afternoon. [35] That was the 27th.

Mr. Geltman: I offer it in evidence.

Mr. Silverman: No objection.

254

Trial Examiner Scharnikow: General Counsel's Exhibit 4 is admitted in evidence.

(The document previously marked General Counsel's Exhibit 4 for identification was received in evidence.)

• • • • •

[36] Q. (By Mr. Geltman) After you received the telegram, what did you do? A. That day, immediately, I mean within a half an hour, I called the Bull Line office, tried to get in touch with Mr. Frey, but he was not in the office, and I left instructions there for him to call me or get in touch with me as soon as possible.

255

Q. Did you see Mr. Frey that day? A. No, sir.

[37] Q. Did you see him the next day? A. Yes. I saw him in the morning at about approximately nine, nine-thirty, the following morning, and I showed him the—

Q. That would be Saturday? A. That is Saturday, yes. I showed him the telegram and he read the telegram over.

Trial Examiner Scharnikow: Which telegram is that now?

The Witness: That is the one dated February—

256

Willard C. Fowler, for Board, Direct

Q. (By Mr. Geltman) General Counsel's Exhibit 4; is that right? A. That's right, yes, sir. .

And after Mr. Frey read the letter—I mean the telegram—he says, "What is the matter? Aren't you in good standing with the union?"

"Yes," I says, "I am in good standing. I couldn't understand that telegram because the other man had got off."

So he said, after he asked me if I were in good standing, he said, "Show me your card for your dues," which I did.

257

So, at that point I called Mr. Howe from the pier telephone.

[38] Q. Had you paid your dues to the Radio Officers' Union for the first quarter of 1948? A. That is right. The receipt is there.

Q. Did you receive a receipt when you paid your dues? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. I show you this paper and ask you to tell me what that is? A. This is a receipt from the Radio Officers' Union showing that I was in good standing through the first quarter of 1948.

258

Q. You mean, showing you had paid your dues? A. Yes.

.

[39] Mr. Geltman: I offer this in evidence as General Counsel's Exhibit 5.

(Thereupon the document above referred to was marked General Counsel's Exhibit 5 for identification.)

Mr. Silverman: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 5 is admitted in evidence.

Willard C. Fowler, for Board, Direct

259

(The document previously marked General Counsel's Exhibit 5 for identification was received in evidence.)

Q. (By Mr. Geltman) You had been a member of Radio Officers' Union, had you not, prior to January of 1948? A. Yes, sir.

Q. For about how long? A. It says on that card.

Q. Does this refresh your recollection? A. From July 1, 1942.

260

[40] Q. When you spoke to Mr. Frey, was there any discussion with respect to the radio officer who had been on the ship?

The Witness: Mr. Frey told me it was his understanding that the operator—that the previous operator was just supposed to make the trip from a port down south to New York on a temporary clearance and that he was supposed to get off as soon as the ship signed off articles in New York.

261

[41] Q. (By Mr. Geltman) Let me make myself clear; was there any discussion as to whether or not that radio officer was then on the ship? A. Yes. I told Mr. Frey at that point that the radio officer had left and that he had taken all his baggage off.

Q. When you first saw the radio officer on the ship on Thursday— A. That's right.

Q. (Continuing) —what sort of equipment or what sort of baggage did he have there? A. He had a valise and one or two suitcases.

262

Willard C. Fowler, for Board, Direct

Q. Besides the baggage, were there any other things, anything on the wall, any other property, anything else that was apparently the property of this radio officer the first [42] time you went there? A. No. Only his baggage.

Q. Was there any license? A. No. He had taken his license down.

You see, according to law, the radio operator on the ship must post the license on the bulkhead in the radio room but he had taken his license down.

263

Q. At least you did not see any license? A. I did not see any license. The frame was there.

Q. That was on Thursday? A. That was on Thursday night.

Q. As of Saturday, you had been in the radio officer's room? A. Yes.

Q. Was there anything whatever left of his baggage? A. No. There was no baggage left on the ship. There was none of his baggage in either the radio room or his quarters.

Did you look? A. Yes. I looked thoroughly. There were no—the baggage had been taken off some time during the morning of Friday.

264

Q. I think you testified that after you spoke to Mr. Frey you spoke to Mr. Howe. You telephoned to Mr. Howe, didn't you? A. I called Mr. Howe from a pier telephone.

Q. Was that after you spoke to Mr. Frey? A. That was after I spoke to Mr. Frey.

Q. Tell us what happened. [43] A. I called Mr. Howe on the phone and told him I had received the telegram—that telegram (indicating)—

Q. General Counsel's Exhibit 4? A. That's right. And—

Q. This is the pier telephone where the SS Frances was located? A. That's right.

When I telephoned him I asked him for a clearance for the Frances, and at that point he told me that I would never be given a clearance for any future job for Bull Line ships.

Q. Did he make any reference to the Frances job? A. I asked him for a clearance for the Frances at that point.

Q. What did he say about that job? A. He said, "Absolutely not," that I would not be given any clearances for the Frances or for any Bull Line ships in the future.

Q. Did he say why? A. Yes, he said I was trying to steal jobs from other members of the union.

266

And I asked him, I said, "What was his reason for taking that stand, that he had never done it in the past."

And at that point he says, "Well, I don't care to discuss it over the phone," he says, "Suppose you come up to the Radio Officers' Union office and we will discuss it further there."

[44] At that point I told him I was sorry, when I came to New York I didn't even know there was a man on the ship.

He said, "You were in the union offices on Thursday, and—," he says, "Why didn't you come in then and speak to me about a clearance?"

267

Q. In the union office? A. In the union office.

He said, "Why didn't you come in and speak about a clearance for the Frances?"

I said, "You were busy at the time and there was no particular rush and I didn't think it was necessary because I had no idea of signing Articles without obtaining a clearance from the union. As a matter of fact, I had no thought in my mind about signing on the Frances."

.

268

Willard C. Fowler, for Board, Direct

Q. On previous occasions, who had given you a clearance from the union on those occasions? A. Mr. Howe.

Q. For particular jobs? [45] For any particular job.

Q. Where did you stay that night? A. Well, after the telephone call Saturday I stayed on the ship.

Q. Did you go to the union? A. No. I made an appointment with Mr. Howe to come down to the union offices early Monday morning. The following Monday morning.

Q. Did you go down— A. Yes, I went the following—

269 Q. (Continuing) —on Monday morning? A. On Monday morning.

Mr. Geltman: That would be March 1, 1948.

Q. (By Mr. Geltman) Tell us as fully as you can what happened when you came to the union. A. Well, I walked in to the union office that morning, Monday morning, and I sat down and showed Mr. Howe the telegram.

And Mr. Howe—

Q. You mean General Counsel's Exhibit 4? [46] That's right.

270 And at that point Mr. Howe lit into me and he says—asked me if I were trying to break the union.

I says, "No, there was nothing like that in my mind."

He says, "Well, what business had you going down to the ship without first obtaining a clearance from the union?"

I said, "As far as me being on the ship was concerned, that had nothing to do with me obtaining clearance. The fact that if I signed on the ship, that I must get clearance from the union before I signed on the ship."

And he says, "Well," he says, "As far as the Bull Line is concerned," he says, "You are through."

Willard C. Fowler, for Board, Direct

271

He says, "You and a few more good company men down there," and he mentioned Krause, Lopez, Bernard—

* * * * *

Trial Examiner Scharnikow: What did he say about them?

The Witness: He says, "You and those company men would not—", he says, "—are trying to form their own union."

He says, they would never, he says, "They were going to break it up."

272

Q. (By Mr. Geltman) Was that the end of the conversation? How long did it last? A. No. After that, why—when I first went into the union office that morning, Mr. Howe said to me, he says, "If those [47] members in the outer office knew what you did, you would get yourself torn to pieces right now."

Q. To whom was he referring? A. He was referring to me.

Q. You said, "the members in the outer office." In other words, there is an outer office and he was in the inner office? A. There is an outer office and he was in the inner office. And he said, "If they knew the stunt you pulled, you would get yourself torn into pieces."

273

And I said, "First of all, what have I done?"

He said, "You have knocked another union man out of a job."

I says, "I haven't signed a clearance; how could I possibly displace the member on the job?"

He says, "To sum up the whole thing, you are through, as far as the Bull Line is concerned."

And he says, "We have plenty of jobs available, and if

274

Willard C. Fowler, for Board, Direct

you want to straighten yourself out and take these other jobs," he says, "Why, you can have it," he says, "but as far as the Bull Line is concerned, you will never be given another clearance to work for them again."

So I told him, I says, "Well, there has been a big misunderstanding and I seem to be right in the middle of it," and I says, "In that case I will go back to Miami and forget [48] about the whole thing."

275

He says, "There is no sense in going back to Miami now since you come up here; why don't you take one of these other jobs?"

I says, "No. Forget about it. I will go back to Miami and let the whole matter drop."

And then the conversation turned to a more friendly basis, and I said, "Can I stay on the ship until I can get reservations back to Miami?"

And he says "Yes."

.

Q. Did you stay on the ship that night? A. Yes, sir.

276

Q. While you were on the ship either that night or thereafter, did you meet any other radio officer? A. Well, the following morning, about—oh, approximately nine or ten o'clock.

Q. That would be Tuesday morning? A. Tuesday morning.

[49] Q. March the second? A. March the second.

That Tuesday morning another operator came down and he came aboard ship—he came to the radio room and I was in my quarters at the time and he says, "I have been assigned to this ship."

.

Willard C. Fowler, for Board, Direct

277

[50] Q. All right. Did you stay on the ship or did you get off? A. I stayed on the ship until about two o'clock in the afternoon.

.

[54] Q. Did you stay in New York after that or did you leave town? A. I left town the following day, March 3.

Q. Where did you go? A. I went back to my home in Miami.

.

[56] Q. After you got back to Miami, did you have any contact with the union? A. Well, at a later date I sent Mr. Howe my union dues for the second quarter of 1948.

278

Q. Did you receive any reply? A. Yes. I received a letter from him.

Mr. Geltman: Mr. Reporter, mark this for identification General Counsel's Exhibit 6.

(Thereupon the document above referred to was marked General Counsel's Exhibit 6 for identification.)

279

Q. (By Mr. Geltman) Will you look at this paper, please, and tell me what it is, referring to General Counsel's Exhibit No. 6 for identification? A. This letter is dated March 25, 1948, so just a day or so prior to this date I wrote Mr. Howe. I had sent him my dues for the second quarter of 1948, and this is the letter he wrote [57] to me in answer to the dues I sent him.

Mr. Geltman: I offer it in evidence.

Mr. Silverman: No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit 6 is admitted in evidence.

280

Willard C. Fowler, for Board, Direct

(The document previously marked General Counsel's Exhibit 6 for identification was received in evidence.)

Mr. Geltman: Mr. Reporter, will you mark these for identification, please, as General Counsel's Exhibits 7-A and 7-B?

281

(Thereupon the documents above referred were marked General Counsel's Exhibits Nos. 7-A and 7-B for identification.)

Q. (By Mr. Geltman) I show you these papers marked for identification as General Counsel's Exhibits 7-A and 7-B and ask you what they are. A. These two papers are union cards. One is a union card showing I am in good standing with the union; and the other is the union dues receipt which I received along with that letter dated March 25.

Q. Did the card also come with that letter? A. Yes, the card and the—

282

Q. Both of those papers came with the letter? A. Both of those papers came with the letter.

Mr. Geltman: I offer them in evidence, asking leave to [58] submit a photostat for General Counsel's Exhibit 7-A.

Mr. Silverman: Do I understand that the witness testified both of these came in the letter which has been marked General Counsel's Exhibit 6?

Mr. Geltman: Yes, that is right.

Mr. Silverman: No objection.

Willard C. Fowler, for Board, Direct

283

Trial Examiner Scharnikow: General Counsel's Exhibits 7-A and 7-B are admitted in evidence.

(The documents previously marked General Counsel's Exhibits 7-A and 7-B were received in evidence.)

Trial Examiner Scharnikow: That is true: You did get the union card, General Counsel's Exhibit 7-A, in that letter, which is General Counsel's Exhibit 6?

284

The Witness: Well, the letter and the two cards both—the three items came in the same letter.

Mr. Geltman: I call attention to the fact that the dues card, General Counsel's Exhibit 7-A says:

"Continuous member since July 1, 1942," and also says, "Good until June 30, 1948, unless revoked."

Q. (By Mr. Geltman) After you got that letter of March 25, did you go back to New York? **A. Yes. I—**

Q. When did you go back?

.

[59] **A. I left Miami April 21, 1948 and arrived in New York the following day.**

285

Q. That is, April 22, and that would be a Thursday according to the reverse side of this Government calendar?
A. Yes.

.

Q. (By Mr. Geltman) After you arrived, did you communicate with either the A. H. Bull Steamship Company or the Radio Officers' Union? **A. When I arrived back, I went to a hotel and I called Mr. Frey and I told him I was back in town and I asked him—**

.

286

Willard C. Fowler, for Board, Direct

Mr. Silverman: What was the date of this again, please?

The Witness: It was either the afternoon of arrival or the next morning.

Q. (By Mr. Geltman) That would be the 22nd or 23rd?
A. That is right.

Q. Thursday or Friday? A. Thursday or Friday.

* * * * *

287

[60] Q. (By Mr. Geltman) What was your conversation with Mr. Frey? A. I told Mr. Frey I was back in town; and I asked him if there was anything doing.

And he says, "Well, keep in touch with me, something might come up in the next couple of days."

Q. After that conversation did you have any contact with the union? A. Yes. I went to the union Saturday morning of that week.

That Saturday—what is that?

Q. That is April 24.

288

What happened when you got to the union? A. When I went up to the union, I looked—I went there primarily to see if I had any mail.

And while I was there I had a conversation with Mr. Howe and he said—

I told him, I says, "I came back to New York on the basis of that letter," he had sent me.

Q. Referring to General Counsel's Exhibit 6? A. That is right. The letter was dated—

[61] Q. March 25? A. March 25.

And Mr. Howe says, "Well," he says, "well, we have plenty of jobs available for you but it still stands as far as the Bull Line is concerned: You will be given no clearance for any Bull Line ship."

That was the first word he spoke after I told him I came back to New York on the basis of that letter.

When he says that, I says, "Well, being that I am on top of the rotation hiring list," I says, "I must be or you wouldn't offer me these other jobs," I says, "and the fact that I am a member in good standing there is nothing in the bylaws of the Radio Officers' Union or the constitution of the Commercial Telegraphers Union saying I could not be allowed a choice of ships and companies."

He said, "Well, you are, as far as any other company is concerned; but you will be given no clearance for any ships of the Bull Line."

290

It was then he repeated the conversation I had previously with him about being a company man.

He said, "Frey has been talking too much to you down there and making a company stiff out of you," and he says, "I am going to break it up right here and now." He says, "All the old Bull Line stiffs—" or Bull Line Company men—"will not be given any clearance at any future time."

[62] Q. What happened at the conclusion of the conversation? I mean, did you leave? A. Yes, I left the office. I told him that—well, I would be back in the Radio Officers' Union office the following week.

291

I says that I have some plans, I want to visit some friends over the week-end.

I got up to leave and he said, "Don't forget what I told you about the Bull Line. Just forget about any clearance for the Bull Line ships."

That is all he said at that point.

Q. This was on Saturday? A. Saturday.

Q. Did you come back to the union office? A. I come into the union office early Monday morning. It was about—between nine and ten o'clock. And I sat down in the outer

292

Willard C. Fowler, for Board, Direct

office. There were possibly six or eight other members sitting around in the office and the office—

Q. Let's see. Mr. Howe sits in the inner office? A. His office is in the inner office.

Q. And his desk is in the inner office? A. Yes.

Q. And in the outer office people come and seek jobs; is that correct? A. Yes, it is really a meeting room but it is sort of a lounge.

293

[63] Q. You were sitting there? A. I was sitting there. And the office—whole office was in charge of a Mr. Glynn.

Q. What is his job? A. There is one point I forgot to mention on the Saturday incident—I mean the previous Saturday. Can I—

Q. Yes, tell me what it is. A. It is the fact Mr.—in the process of Mr. Howe offering me a job with another company, he called Mr. Glynn in to the office and had Mr. Glynn act as a witness to him.

Q. A witness to what? A. To witness to him offering me the other job.

294

Trial Examiner Scharnikow: Let's get the conversation.

Q. (By Mr. Geltman) Did he offer you a specific job? A. No, he did not offer a specific job.

Q. Just that he was offering you a job with somebody else? A. Some other company.

Q. Not Bull? A. That's right.

Q. You came in here on Monday and you say the office was in charge of Mr. Glenn on Monday? A. Yes.

.

[64] Q. Tell me what happened that morning. A. Along

Willard C. Fowler, for Board, Direct

295

about—oh, I would say ten o'clock—Mr. Glynn came out of the inner office and announced he had two jobs open.

One was for a tanker and the other one was for a Waterman Line ship, the SS Semmes.

Trial Examiner Scharnikow. Was that the Water Line.

The Witness: Waterman Line.

And he asked who wanted the job. Well, everybody in the outer office—that is, all the members—they all turned in their names, including myself.

296

Trial Examiner Scharnikow: How many men were there sitting there?

The Witness: I cannot be certain, but I would say approximately six or eight.

Q. (By Mr. Geltman) Continue. A. And so it was—when—after all these men there turned in their names, Mr. Glynn went into the inner office and looked up to see who was on top of the rotation hiring list.

[65] So he came out and announced I was at the top, I was the top man on the rotation hiring list, and that I was to be given the job.

297

So he then went back into the office. He asked me if I would take the job. I said I was not certain about it but I would go down and take a look at the ship. So I asked him then to write me out a clearance for it.

Q. Asked— A. I asked Mr. Glynn to write me out a clearance for it.

So Mr. Glynn went back into the inner office and in the meantime one of the other members that was in the group

298

Willard C. Fowler, for Board, Direct

told me to be careful about taking the Semmes, that they had had a lot of labor trouble.

* * * * *

[66] Q. Continue. A. So—

Q. Mr. Glynn is on the inside making out the clearance. A. Mr. Glynn came out into the outer—the lounge, the outer office, and handed me the clearance.

I told Mr. Glynn at that time, "I am not sure whether I am going to take the job or not."

299

He said, "In either event, whether you do or don't, give me a ring back and let me know what you decide to do."

So at that point I left the union office and went down to the Waterman Line.

* * * * *

[68] Q. (By Mr. Geltman) You took this and you say you went down to the Waterman Line? A. Yes. I went—left the union office and went to the Waterman Line Steamship office. And I met the lady in charge of the employment office—evidently she was the personnel manager at the Waterman Line Office and I showed her the assignment slip and told her that I was not sure whether I was going to take the ship—that I wanted to go out and look at it.

300

* * * * *

[69] Q. Then what did you do? A. From that point I went to the ship, where it was berthed in Staten Island, and I went aboard the ship.

And there was nobody on the ship except a relief mate.

And I asked him if I could see the radio quarters. I said I was assigned to the ship and that I wanted to check over the equipment.

Willard C. Fowler, for Board, Direct

301

Well, he said, "I cannot let you in the radio room without authorization from the company."

* * * * *

[70] Q. (By Mr. Geltman) So you had a conversation with this man, [71] and then what did you do?

You left the ship? A. I left the ship and on the way back from this ship, I decided to stop off at the Bull Line Company office to see—

* * * * *

302

Q. Continue. A. I decided to go by the Bull Line to collect some back pay. It was either back pay or back overtime I had coming from the previous ship.

And I went to the company offices and I met—I asked—I met Mr. Frey and I asked him about this back pay. And I cannot remember whether he made out a voucher; and I cannot remember whether I received the pay at that point. But during the course of the conversation with Mr. Frey, he said he had a job on the Evelyn, if I could get clearance from the union.

And I said, "Well, you know how the situation is." I says, "I don't know whether Mr. Howe will give me a clearance." I said, "Anyway, I will call him."

303

[72] I just told him I came back from the Waterman Line ship and it was all fouled up and I decided not to take it.

He said, "If you can get the clearance, I will give you the job." He says, "If you can get the clearance, I will give you the job," he says, "and get in touch with the union about it."

So, at that point I walked out of the company office and I walked down with him about a half a block from the office and called—went into a pay phone booth and I called Mr. Howe.

304

Willard C. Fowler, for Board, Direct

Q. You called the union. Go ahead. A. I called Mr. Howe. And I dialed the number, and Mr. Howe answered it, and I made a mistake at that point.

I said, "Mr. Frey!" And Mr. Howe, said, "Fowler, you are getting your wires crossed, aren't you?"

.

Trial Examiner Scharnikow: Who said, "You are getting your wires crossed?"

The Witness: Mr. Howe said that.

305

Q. (By Mr. Geltman) Did you know his voice over the telephone? [73] A. Yes, I knew his voice but my mind was in a state of confusion then which was the reason for me making that mistake.

And so he said, "Fowler, what are you doing down at the God damn Bull Line?"

I said I was down there to—I said, "I just come from there to collect some back pay that I had coming."

He said, "You are a God damn liar; you were there to steal some more jobs from the other members."

306

I said, "No, I was not." I said, "I just went by there to collect some back pay; and if I want to go up there," I said, "it is still a free country, I should be allowed to go up to the office whenever I want to."

He said, "I told you to stay away from the Bull Line, if you had any business down there for you to come to us and we would have taken care of it for you."

At that point he says, "You were given a job on a Waterman Line ship; why didn't you take it?"

I said the reason was that the ship was all fouled up and I decided not to take it.

I said, "What are you trying to do? Railroad me out of the union?"

Willard C. Fowler, for Board, Direct

307

Mr. Howe said, "Why don't you—" he says, "As far as I am concerned, you are through. Why don't you go over and join the AGA?"

Q. What is the AGA? [74] A. It is another radio officers' union that is affiliated with the CIO.

Q. And the Radio Officers' Union is affiliated with the AF of L; is that right? A. The Radio Officers' Union is affiliated with the AF of L.

Q. Continue. A. And he says—when I asked him, I said, "Are you trying to railroad me out of the union?"

308

He said, "Why don't you go over and join the ACA? Maybe they will give you a job."

[75] I said, "No, I am not. I just decided not to take the Semmes."

He said, "Well, I cannot waste all day talking to you." Then he hung up the receiver.

Q. Had you finished the conversation when he hung up? A. Well, he cut the conversation short right at that point. And I immediately called him back and I says, "Is it your final decision in the whole matter?"

He said, "That is it," he says.

I said, "Is this your final decision?"

309

He said, "Yes."

I said, "Well, in that case I will turn the whole matter over to the National Labor Relations Board and let them decide what to do about it."

And I hung up. I mean the conversation was terminated at that point again.

Q. After you spoke to Mr. Howe, were you in touch with the A. H. Bull Steamship Company? A. Well, at that point, which was approximately—maybe 11 or 12 o'clock, after the conversation was—phone conversation was

310

Willard C. Fowler, for Board, Direct

finished, I walked around in that section down there for about an hour, hour and a half because my mind was in a state of confusion then. I didn't know what to do.

So I walked around and along about 1:30 or two o'clock I called Mr. Frey on the phone and I told him the conversation [76] with Mr. Howe and that I would not be given any more clearances for any more Bull Line ships.

.

311

The Witness: So I called Mr. Frey and I told him the conversation I had with Mr. Howe and that Mr. Howe would not give me a clearance for any more Bull Line ships and the best thing for me to do is forget about the whole matter because—I mean he also stated that—it was such a point I would not be given any clearances at all.

So Mr. Frey then stated that he had a job for me and that he would give me a clearance if—he says he would give me a job if I could obtain a clearance from the union. [77] But, he said, "In that case I am just sorry, but there is nothing I can do about it."

312

So I asked if he knew any other place I could get a job. And he said you might try United Fruit, which is not affiliated with the Radio Officers' Union.

.

[78] Q. (By Mr. Geltman) Did you have any subsequent conversation with either the Bull Steamship Company or Mr. Howe? A. Not after Monday.

Tuesday—no, I will take it back.

Trial Examiner Scharnikow: You have answered the question. However, are you changing it now?

Willard C. Fowler, for Board, Cross

313

Did you have a conversation after Monday with either Mr. Howe or Mr. Frey?

The Witness: No. With Mr. Frey on late Tuesday.

Q. (By Mr. Geltman) Tell me what it was. A. I told him that I went to United Fruit Company and applied; and then I went to Socony Vacuum and they took my name, but they had nothing—no opening for me; and I also told him I had finally decided to go back to Miami under the circumstances.

314

Q. Did you go? A. I left on the 28th. That was Wednesday.

Q. Did you stay in Miami? A. Yes. I stayed up until I come up here.

Q. You stayed there for over a year? A. Yes:

* * * * *

[79] Cross Examination:

Q. (By Mr. Silverman) Mr. Fowler, when did you first join [80] the Radio Officers' Union? A. Approximately June or July of 1942.

* * * * *

315

[84] Q. (By Mr. Silverman) I would like to direct your attention Mr. Fowler, to this April situation first.

Do I understand correctly that on the morning of April 26th you appeared at the office of the union and waited in the outer office along with several other members of the union?

Was that the date? A. Was that Monday?

Q. Yes, I am informed that was a Monday morning. A. Monday morning about nine—about 9 a.m.

Q. And the purpose of your coming to the union office

316

Willard C. Fowler, for Board, Cross

on that date was to go to work; is that right, Mr. Fowler?

A. When I walked in the union office, I did not exactly have that in mind. But not until the job came up—the job of the [85] Semmes came up.

Q. Were you seated in the outer office along with six or eight additional members of the union on that morning?

A. Yes.

317

Q. Then there came a time, I believe you testified, between nine and ten that morning when Mr. Glynn came to the outer office and announced that there were two requests for radio officers, one being from a tanker and one from the SS Semmes; is that right? A. That is correct.

Q. This tanker you referred to, was that a ship of the Bull Line or was it some other company? A. No. It was a ship of another company.

Q. Another company. So that the only job openings that were announced that morning were job openings of two lines, neither of which was the Bull Line; is that correct? A. That is correct.

318

Q. Then I believe you testified that when those jobs had been announced the men in the office with you who were members of the union handed in their names or turned in their names, is that correct? A. That is correct.

Q. And you did the same, did you? A. Yes.

Q. You turned in your name? [86] A. Yes, I did.

Q. What was the purpose of your turning in your name at that time? A. To bid on the job opening.

Q. I believe you testified after you, along with the other men, had bid on those job openings, Mr. Glynn, after consulting the records, returned to the outer office and announced that you were the top man entitled to the job and could therefore have it; is that right? A. That is correct.

Willard C. Fowler, for Board, Cross

319

Q. And he thereupon made out this clearance slip, which has been marked General Counsel's Exhibit No. 8, and you signed it; is that correct? A. That is correct.

Q. Did you understand when you were signing this acceptance of this assignment you were indicating a willingness to work aboard this ship of the Waterman Steamship Company? A. I took it with a willingness to work for—on the Waterman Line ship, but I did not have—I could have rejected taking the ship if I found out it was not satisfactory.

320

.

[91] Q. Did you ever go back to the office of the union after the morning of April 26, 1948? A. Back to the office—

Q. Yes. [92] A. (Continuing) —of the union after the morning, after I received the clearance from the Semmes?

Q. That's right. A. No.

Q. You knew that any openings for jobs that might come into the union office were announced at the office of the union from time to time as they were received, did you not? A. That was right.

.

321

Q. On this morning of April 26, 1948, did you hear any announcement of any opening aboard a Bull Line ship? A. Previous to that, or right at that point?

Q. Right at that point first, did you hear anything during the morning you were there? A. I knew there was going to be an opening coming up on the—

.

[93] Q. (By Mr. Silverman) When you said a moment ago you knew that there was going to be an opening, was that on the basis of something you had learned at the

.

322

Willard C. Fowler, for Board, Cross

union or something you had learned from some outside source? A. An opening on the Bull Line or—

Q. On the Bull Line, yes. A. That was something from an outside source.

Q. As far as you know, did the union have any knowledge whatsoever of any opening aboard a Bull Line ship?

A. As far as I know, no.

323

Q. You knew, did you not, Mr. Fowler, that any man in the union hall, union office, had a right to bid on any job announced at the union office, did you not? A. Yes.

Q. You also knew that when such bidding took place, the member of the union who was longest out of work or who had top position on the rotary hiring list would be afforded first preference for any job opening that might be announced; isn't that so? A. Not particularly, because I had been employed by the company through the union on another basis, not on a rotation hiring basis.

Trial Examiner Scharnikow: When you say "by the company," [94] what company do you mean?

The Witness: By the Bull Steamship Company.

324

Q. (By Mr. Silverman) You knew, for example, on this morning of April 26, 1948, the reason you were given first preference to this assignment aboard the Raphael Semmes of the Waterman Steamship Line was the fact you were the man with the top position on the list; isn't that so? A. That is correct.

Q. And that is why you had the privilege of taking that job ahead of any of these other six or eight men who were in the union office at the time; isn't that so? A. That is so.

.

Willard C. Fowler, for Board, Cross

325

[95] Q. (By Mr. Silverman) When these two job openings were announced on April 26, 1948, there was nothing to compel you to bid on those openings, was there? A. Yes, there were.

Q. Do you refer to an alleged conversation with Mr. Howe in giving that answer? A. Yes.

Q. What are you referring to? Or are you referring to the [96] general system? A. No, I am referring to the previous conversations with Mr. Howe.

Q. Divorce your mind from that for a moment, if you can, and I ask you whether normally if these two job openings had been announced, whether you were not free to pass up those openings and wait for another opening that might be more to your liking? A. Well, I would have been free to under normal circumstances, yes.

326

Q. Now, if you passed up those openings, the next job opening that might be announced would be one as to which you would again have top priority; isn't that so? A. That is so, yes.

.

[97] Q. (By Mr. Silverman) You went to the Waterman ship and looked it over; is that right? A. I went to the Waterman ship, that's right.

327

Q. And on the way back from Staten Island you stopped at the Bull Line office, is that right? A. That is correct.

Q. And you had a conversation there with Mr. Frey, is that correct? A. That is correct.

Q. And after you had had your conversation with Mr. Frey, you left the Bull Line office and you went to a phone booth, is that right? [98] A. That's right.

Q. And from that phone booth you called Mr. Howe? A. That is correct.

328

Willard C. Fowler, for Board, Cross

Q. And in the course of that conversation with Mr. Howe did you tell him that you had decided not to take the job aboard the Waterman Line ship? A. Yes, that is correct.

Q. Did you during the course of that conversation testify Mr. Howe asked you to come up to the union office?

A. Mr. Howe did not ask me to come up to the union office.

329

Q. Did he say anything to you about the fact if there were any back pay due you from the Bull Line, "come to us and we will take care of you"? A. He says, "You could have." He did not say come to the office. He said, "If you would have told us previously, we would have taken care of it."

Q. What date was this? A. That was Monday morning.

Q. This is still April 26th, is that right? A. That Monday morning. I am going by days of the week, not dates.

Q. Did you have any knowledge about an opening aboard a Bull Line ship at that particular time? A. Yes, I did.

330

Q. Do you know whether the union had any knowledge of an [99] opening aboard a Bull Line ship at that time? A. No.

Q. Did you ask Mr. Howe for a clearance for any particular Bull Line ship on April 26th, during the course of this telephone conversation? A. No, I did not have a chance.

Q. Did you ever speak with Mr. Howe again after that conversation, after he had hung up and you called him back? Or was that your last conversation with him? A. After the telephone conversation terminated, that was my last conversation with him.

Q. Do you recall Mr. Howe saying anything during the course of that conversation to the effect that they

Willard C. Fowler, for Board, Cross

331

had no Bull Line opening at that time? A. I have no recollection of that, no.

Q. Don't you recall his saying to you that "We have no opening for a Bull Line ship at this time"? A. That statement was not made during the conversation.

* * * * *

[104] Q. I believe you testified you had been to the union office on the Saturday preceding April 26th, which would have been April 24th, is that right? A. Either Friday or Saturday. I cannot recall the exact date. I mean I cannot recall the exact day of the week. It was either Friday or Saturday.

332

Q. You picked up your mail on that occasion, didn't you? A. That's right.

Q. Did you sit down in the union office, wait for a job? A. No.

Q. Did you ever talk with Mr. Glynn on that day?

* * * * *

[105] The Witness: I had a conversation when I went in telling Mr. Howe that I came back on the basis of his letter, Mr. Glynn was in the office at that time, and during the conversation with Mr. Howe, Mr. Howe called Mr. Glynn to act as a witness to some statements he had made to me.

333

Q. (By Mr. Silverman) What did you mean when you said to Mr. Howe you had come back on the basis of his letter of March 25th? A. I meant that I was in good standing with the union. That means I was eligible to take jobs that came up in the union, regardless—I didn't mention what particular job, but—

Q. And what did Mr. Howe say to you on that occasion?

334

Willard C. Fowler, for Board, Cross

A. That is on Friday or Saturday, I mean, when I was in the office?

Q. Yes. A. He said we had plenty of jobs, that the union had plenty of jobs available, but also added for me not to expect any clearance for a Bull Line ship.

Q. Did he say anything to you about refraining from [106] soliciting the Bull Line office directly for jobs? A. No. No. He made no—

335

Q. What did you say to him when he said not to expect a clearance for any Bull Line ship? A. Well, I said, "As long as I was in good standing with the union, I had not violated any rules or regulations, that I should be allowed to choose the ship and company of my liking.

Q. Is that where the conversation ended on that day? A. Well, I told him I would be back, that I did not come in right at that point for a job, that I would be back early the following week. And when I left he said, "Just don't forget what I told you about a Bull Line ship."

That is the exact words he used.

336

Q. So that if I understand the picture correctly, on this Saturday, which was April 24th, or Friday, which would have been April 23rd, you had asserted your right to take any job you liked, including a Bull Line ship, and it is your testimony that Mr. Howe had told you he would decline to give you a clearance aboard a Bull Line ship; is that the sum and substance of that conversation? A. Yes, I would say it was.

.

[109] Q. I believe you testified that on Tuesday, which would be April 27th, you went to the United Fruit Lines and to Socony Vacuum, is that right? A. On Tuesday, that is correct.

Q. At that time you knew, did you not, you were still top man on the list at the union office, is that right?

Did you know that? A. Theoretically, yes, but in practically, no, on account of the telephone conversation I had had with Mr. Howe the previous day.

Q. Did Mr. Howe say anything to you in words or substance to the effect you could not get a job? A. That is correct, he did.

Q. He did? A. He did not say the exact words. He said, "as far as I am concerned," he says, "you are through. The best thing for you to do is go back to Miami or go over and try to join the ACA."

338

.

[113] Q. (By Mr. Silverman) On the Friday or Saturday before April 26th, you had, in the course of a discussion or argument with Mr. Howe, taken the position you were entitled to an assignment to a Bull Line ship or any other ship; isn't that so? A. That is correct.

Q. And when you came to the office of the union on Monday, presumably you could have waited until an assignment from a Bull Line ship was announced in the hall, an assignment which you had been led to expect would be forthcoming, isn't that so? [114] A. If I would have followed the regular procedure, yes; but due to the pressure that was put on me, why I figured it was better to take that ship if it were satisfactory—the Semmes—at that point, I figured it was better for me to take that ship.

339

Q. What pressure was applied to you between this conversation of April 23rd or 24th, the Friday or Saturday prior to the 26th, and the morning of the 26th? A. It was the conversation that I had with Mr. Howe telling

340

Willard C. Fowler, for Board, Cross

me that I would not be given a clearance for a Bull Line ship, and the fact that in the February incident that I was told that if I had attempted or if I would attempt to take a Bull Line ship that I would be sorry for it.

* * * * *

[116] Q. Now I want to refer for a few minutes to this February incident.

341

When you came aboard the ship for the first time in February, 1948, had you up to that point contacted the union in any way? A. The only contact I had was walking into the union office and getting my mail.

Q. You had no conversation with anyone in the union office? A. No, not—

Q. You did not let anyone in the union office know directly or indirectly you were planning to go aboard a ship of the Bull Line? A. No. Prior to my first contact with the ship.

Q. And you went aboard the Frances and found a radio officer aboard, is that correct? A. That is correct. On my first contact.

342

Q. This radio officer—do you know his name? [117] A. I don't recall right offhand.

Q. Would the name Kozel refresh your mind on that? A. Yes, that is the name.

Q. When you went to the union office on February 26, did you go there solely for the purpose of getting your mail?

Mr. Geltman: That is a Thursday.

The Witness: That is right.

* * * * *

Willard C. Fowler, for Board, Cross

343

Q. Only for the purpose of getting your mail? A. And I had intended to talk to Mr. Howe when I went there, but he was busy at the time and I did not—I had no [118] conversation with him.

* * * * *

Q. When you got aboard the Frances, did Mr. Kozel indicate [119] to you that he was planning to remain aboard the ship, is that so? A. He did not say he was planning to remain aboard the ship. He says he was going to remain if he could.

344

Q. If he could. As a matter of fact, he asked you what the union had to say about you coming aboard while he is still aboard, isn't that so? A. That's right.

Q. So you got the very clear impression from him, didn't you, that he preferred to remain aboard that ship? A. Well, I told him that we would let the union straighten it out.

* * * * *

[127] Mr. Silverman: In view of the entire situation, I am wondering whether it would be more practical to adjourn for a reasonable length of time to enable us to possibly conclude this hearing at that time.

345

* * * * *

Trial Examiner Scharnikow: I am still of the opinion an adjournment until next Monday at ten o'clock in the morning for the purpose of your preparation is the proper term of the recess. So I am going to adjourn the hearing until ten o'clock next Monday in the same hearing room.

* * * * *

346

Willard C. Fowler, for Board, Cross

[133] WILLARD CHRISTIAN FOWLER resumed the stand and was examined and testified further as follows:

Cross Examination (Continued):

• • • • •

[141] Q. (By Mr. Silverman) I show you General Counsel's Exhibit 8 and direct your attention to the language on the clearance which states:

347

"I hereby agree to notify the Radio Officers Union by telephone or telegram before quitting my ship in any United States port."

You were familiar with that language in the clearance that was issued to all members, were you not, Mr. Fowler?
A. Yes. I was familiar with it.

• • • • •

[147] Q. Let me ask you this, Mr. Fowler: On the occasion of your visits to the office of the union, have you observed a large sign in the union office reading in words or in substance: "Notify the union before you leave your ship"? A. Notify your union before you leave your ship?

348

Q. That is the substance of it. A. Yes.

Q. The sense of it? A. Yes.

Q. You have seen that? A. Yes.

Q. You had seen that before February, 1948, hadn't you? A. Before February, 1948, yes.

Q. Now I ask you whether you know as a fact that one of the major purposes of that rule is to assure the fact that no clearance is issued for a ship before notification has been received by the union that the operator aboard that ship has quit or is quitting the ship?

• • • • •

Colloquy

349

[148] The Witness: The answer is yes.

* * * * *

[153] Mr. Silverman: May I at this time offer in evidence—

Trial Examiner Scharnikow: Will you have them marked first, please, as Respondent's Exhibit 2 and 3?

Mr. Silverman: This is a "standard dry cargo and passenger ship agreement of 1947."

Trial Examiner Scharnikow: Between—

350

Mr. Silverman: Between the Radio Officers' Union and various lines, including the A. H. Bull Steamship Company as well as the Waterman Steamship Corporation.

Mr. Geltman: And the A. H. Bull Steamship Company.

[154] Mr. Silverman: I mentioned that, yes.

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

Mr. Silverman: And may I also have marked this memorandum of agreement bearing date the 16th day of August, 1947 between the Radio Officers' Union and the A. H. Bull Steamship Company?

351

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Mr. Geltman: No objection.

Mr. Silverman: I now offer in evidence Respondent's Exhibit No. 2 for identification.

352

Colloquy

Trial Examiner Scharnikow: Do you wish to offer both Exhibit No. 2 and Exhibit No. 3?

Mr. Silverman: And the Respondent's Exhibit 3.

Trial Examiner Scharnikow: Any objection?

Mr. Geltman: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit 2 and Exhibit 3 are admitted in evidence.

353

(Thereupon, the documents previously marked Respondent's Exhibits Nos. 2 and 3 for identification were received in evidence.)

Trial Examiner Scharnikow: May I ask can you stipulate as to whether or not Respondent's Exhibit 2 and Exhibit 3 are the only agreements in effect between the respondent union and the Bull Steamship Company as of February 27 and also—

[155] Mr. Geltman: As of the time of both these incidents.

Trial Examiner Scharnikow: (Continuing) —and also April 26.

354

Mr. Silverman: Yes, we so stipulate.

Trial Examiner Scharnikow: Is that agreeable, Mr. Geltman?

Mr. Geltman: Yes. We so stipulate.

Trial Examiner Scharnikow: The stipulation is accepted.

Mr. Silverman: May we also have a stipulation to the effect that a like statement is likewise true of the Waterman Steamship Corporation?

Mr. Geltman: I have no knowledge. If you say so, Mr. Silverman, I will take your word, if you so assert.

Colloquy

355

Mr. Silverman: I do so assert.

Trial Examiner Scharnikow: Do you accept the statement?

Mr. Geltman: Yes, I accept the statement.

Trial Examiner Scharnikow: I take it is stipulated, unless you offer proof to the contrary before the close of the hearing.

Mr. Geltman: Yes.

Trial Examiner Scharnikow: Very well. May I ask in connection with that, was that last stipulation intended to include Respondent's Exhibit No. 3: That Respondent's Exhibit No. 3 was also an effective memorandum between the Respondent Union and Waterman?

356

[156] Mr. Silverman: Yes, that is right, and in the identical form.

Mr. Geltman: As to that, Respondent's Exhibit 3 is simply with a single concern. That is to say, it is the respondent on the one hand and the A. H. Bull Steamship Company on the other. There are not in evidence any similar agreements with respect to the Waterman line.

357

If Mr. Silverman will make the same assertion with respect to the existence of such an agreement, I will accept it.

Mr. Silverman: Yes. I am prepared to make the statement that memorandum of agreement in identical form to Respondent's Exhibit 3 was likewise in existence with respect to Waterman Steamship Corporation.

Mr. Geltman: Made when?

Mr. Silverman: The same date: August 16, 1947.

Trial Examiner Scharnikow: Shall I accept that

358

Willard C. Fowler, for Board, Cross

statement subject to the possibility of further proof to the contrary?

Mr. Geltman: Yes, sir.

Trial Examiner Scharnikow: Very well.

.

359

[160] Q. Mr. Fowler, when you came to the office of the union after the receipt of the telegram which has been marked General Counsel's Exhibit 4, is it not a fact you stated to Mr. Howe that Mr. Kozel was remaining aboard the vessel and that had you known that he was aboard you would not have come up to New York in response to the telegram you had received from Mr. Frey? A. You put two questions there together.

Q. Suppose you answer them separately, then. A. The first one: I did not tell Mr. Howe that Kozel was staying aboard. I did not say that.

360

And the second part of your question was if I had known [161] Mr. Kozel was on board the ship, I would not have come up from New York—I mean I would not have come up from Miami: yes, I may have—I may—I mean as near as I can recollect I made some statements similar to that. I would not say in the exact words.

Trial Examiner Scharnikow: Some statement similar to what?

The Witness: Similar to that, I would not have come up if I had known that Kozel—I mean that there was a man on the ship.

.

[162] Q. Did you see Mr. Frey at or between February 26 and the time you saw Mr. Howe at the union office? A. Yes, I saw him once.

Q. What day was that? A. That was on a Saturday: Saturday morning.

Q. And I believe you testified that at that time Mr. Frey told you that Mr. Kozel was only on a temporary clearance; is that correct? A. That I testified that Kozel—that Mr. Frey told me Kozel was on a temporary clearance: Yes.

Q. Did he tell you that? A. Yes, he did. He stated that the man, the former—the regular operator was, as soon as he was ready to go aboard the ship, was to take the job as soon as he got well. That was the former operator that got hurt in New Orleans.

Q. This was February 28 on a Saturday, is that right? [163] A. That's right.

* * * * *

Trial Examiner Scharnikow: Still talking about your conversation with Mr. Frey on Saturday morning—

The Witness: Yes.

▲ Trial Examiner Scharnikow: (Continuing)—when Mr. Frey told you that Kozel was on the ship only on a temporary clearance.

The Witness: That is correct.

Trial Examiner Scharnikow: Did Mr. Frey tell you how long you were expected to work on the ship, the Frances?

The Witness: Yes. I had the understanding—

Trial Examiner Scharnikow: Wait a minute. I asked you did you have any discussion with Mr. Frey that morning as to how long he wanted you stay on this ship, the Frances?

The Witness: Yes.

Trial Examiner Scharnikow: You had such a discussion?

364

Willard C. Fowler, for Board, Cross

The Witness: Yes. I mean it was not a discussion. There was—

Trial Examiner Scharnikow: Did he tell you how long?

The Witness: Yes, he did.

Trial Examiner Scharnikow: You could expect to stay [164] on the Frances?

The Witness: Yes, he did.

Trial Examiner Scharnikow: What did he say?

The Witness: He said I would stay on on a temporary clearance—I mean temporary basis—until the former operator was well enough to come back.

Mr. Geltman: Are you referring to Kozel? May we clear that up?

The Witness: No. I am referring to the former operator, the regular operator of the ship.

Trial Examiner Scharnikow: Did he mention his name?

The Witness: Yes.

Trial Examiner Scharnikow: Do you remember the name?

366

The Witness: Yes. The name was Lopez.

.

[165] Q. Now, after the receipt of this telegram which was General Counsel's Exhibit 4, did anybody from the union appear at the ship?

[166] Trial Examiner Scharnikow: Other than Miller?

Q. (By Mr. Silverman) Other than Miller? A. No.

Q. Was there any picket line thrown around the ship? A. No.

.

Willard C. Fowler, for Board, Cross

367

Q. (By Mr. Silverman) Did anybody personally come down and threaten you in any way? A. Not at the ship, no.

.

[174] Q. And then on Saturday morning, April 24, you went to the union; is that right? A. Well, I testified that I went either—I was not sure whether it was Friday or Saturday.

Q. Yes. What is your best recollection now? A. It was still either Friday or Saturday.

368

.

[176] Q. (By Mr. Silverman) Whether it was Friday or Saturday, you testified you came to the union office; is that right? A. That is correct.

Q. Who was there at the time? A. Mr. Howe and Mr. Glynn.

Q. Were any other members of the union present? A. I do not recall that.

Q. Do you recall whether you had to wait before you saw Mr. Howe or Mr. Glynn? A. I recall upon walking in I walked to the mail box, that is the mail section to see if I had any mail.

369

Q. Yes. And then what did you do? A. Then I started the conversation with Mr. Howe.

Q. Where? A. He was seated at his desk in the inner office.

Q. And was Mr. Glynn in that office at that time? A. No. He was doing some work in a print room that was adjacent to the office.

Q. What did you say and what was the conversation on that date? A. Well, I walked in and I told Mr. Howe that I had received his letter of March the 25th and I came back to town.

370

Willard C. Fowler, for Board, Redirect

And I says, "According to your letter I evidently am in [177] good standing." I says, "I received also the receipt for the dues."

He says, "Yes," he says, "are you ready to ship out?" or words to that effect.

I said, "Yes."

No. I says, "How about shipping out?"

371

He says, "Yes, we have plenty"—well, he says, "We have plenty of jobs but do not expect any clearance for a Bull line ship." He says, "Don't expect any clearance for a Bull line ship because you won't get any. The situation still stands," as in relation to the February incident.

Then I told him, I says, "As long as I am in good standing, I haven't violated any rules and regulations of the union, I do not see why I should not be allowed to select or choose the company and the ship I want to work for."

He says, "That is all very well," he says, "only as far as other companies are concerned; but it does not include the Bull line."

372

Q. Did anything else take place during the course of the conversation? A. Yes. After that I says, "Well, I will be back the first—" I says, "I am not going to do anything for the next couple of days," I says, "I will be back the first part of the week."

And Mr. Howe then said, "If you do, don't forget what I told you about the Bull line."

[193] Redirect Examination:

Q. (By Mr. Geltman) Mr. Fowler, when you came down—referring now to the February incident—you reported to the ship you said on Thursday night. That is February 26. And you came down again the following day; there

Willard C. Fowler, for Board, Redirect

373

was a conversation with Kozel on Thursday night; and you showed up on Friday.

You went to the radio room at that time, didn't you?
A. On Friday?

Q. On Friday. [194] A. Yes, that's right, on Friday.

Q. About what time of day was it? A. It was approximately 11:30, approximately 11:30.

Q. I do not ask you to be absolutely precise, this being two years ago. Give me the best of your recollection.

When you got into the radio room, was there anything belonging to Kozel there? A. No, there was nothing.

374

Q. Was his license on the wall? A. His license was down. I mean it was taken off of the bulkhead. That is the first I knew he had actually left, when I examined the license holder on the radio room bulkhead.

Q. How long have you been a radio operator, Mr. Fowler? A. A commercial—do you mean—

Q. On board ship. A. On board ship from approximately June or July of 1942 up to January the 2nd, 1948.

Q. Is it customary while you are attached to a ship to keep your license in view? A. That is an FCC—I mean by FCC, that is a Federal Communications Commission requirement that your license be posted on the bulkhead when you are assigned to that ship.

375

Trial Examiner Scharnikow: Is there any dispute as to that? I will take that as the fact.

.

[195] Q. (By Mr. Geltman) You stayed aboard the ship that night? A. What night was that?

Q. That night you reported and found Kozel had left.
A. That is Friday?

376

Willard C. Fowler, for Board, Redirect

Q. Yes. A. Friday night I stayed aboard the ship, that is right.

Q. There was no sign of Kozel? A. There was no sign of Kozel, otherwise I would not have stayed on the ship, because my primary reason for coming down to the ship on Friday noon, approximately noon, was to determine whether Kozel was going to stay, to continue on in the employ of the ship or not.

.

377

Q. It is. Friday that you got the telegram from the union, isn't it? A. Late Friday afternoon. That is the 27th. February 27, 1948.

[196] Q. And after you got that telegram, you telephoned Mr. Howe at the union, didn't you? A. I telephoned Mr. Howe. When I received the telegram, I telephoned Mr. Frey and—

Q. I am sorry.

And you telephoned Mr. Howe on the following day, on Saturday. A. On Saturday, that is correct.

Q. On Saturday night you stayed on the ship? A. Yes, I did.

378

Q. And on Sunday you stayed on? A. Yes. I stayed on Sunday.

Q. You stayed in the radio quarters all the time? A. Yes, I stayed in the radio quarters all the time.

Q. Was there any sign of Kozel? A. No, there was no sign of Kozel after I came aboard Thursday, approximately noon.

Q. You mean Friday. A. I mean—I am sorry. Friday, approximately noon. That is after I had the conversation with him Thursday night.

.

[197] Q. You got the telegram on Friday; you called Mr. Howe on Saturday. A. Saturday.

Q. And you came down there to see him. A. I made the appointment to come up Monday morning and see him.

Q. Now you have come up to see him. A. I walked in and Mr. Howe was seated at his desk in the union office at 1440 Broadway; and I walked in and I says, "Mr. Howe, there seems to be quite a mixup over this Frances." I says, "I received your telegram. Am I suspended?"

Mr. Howe immediately says, "Fowler, if those men in the outer office knew what you did, they would tear you to pieces."

I says, "What have I done?" I says, "I have not signed on any ship." I says, "I am not a crew member of the S. S. Frances." I says, "I haven't done anything."

He says, "Fowler, as far as you are concerned, you are through with the Bull Line." He says, "Don't ever expect to get another clearance issued to you from the Bull Line again." He says, "You and a few more of those good company men down there are kind of running things to suit themselves and I am going to break it up."

"Well," I says, "Mr. Howe, I have never done anything against the union to cause all this confusion." I says, "I have never signed on a ship before without first obtaining a [198] clearance."

He says, "That makes no difference at all." He says, "As far as the Bull Line is concerned, you are through."

And then Mr. Howe, after an interval there of, I would say—during the course of the conversation—he says, "Now, if you want to straighten yourself out," he says, "We have plenty of jobs available if you want to take a ship—a job with another company or another ship—a ship of another company, why, you can; how about it?"

382

Willard C. Fowler, for Board, Redirect

I says, "Well, this whole business has me all confused," I says, "I cannot have a clearance for the Frances?"

He says, "Absolutely not." He says, "You are through as far as the Bull Line is concerned."

Well, I says, "This thing has me kind of confused." I says, "I think the best thing for me to do is go back to Miami. I came up here with the understanding there was a job open but I did not know it had anything to do with displacing another man."

383

And then Mr. Howe insisted that I take a job with another company.

He says, "There is no sense you coming up all the way making the trip up," he says, "if you want to take a job with another company, why, you can. How about it?"

I says, "No. Just leave it go at that," I says, "I am going back to Miami."

[199] So the conversation turned to a little friendlier vein after I found out I was not going to get myself torn to pieces by staying there, and I asked Mr. Howe if I could stay aboard the Frances that night, which was Monday night, and Mr. Howe consented to this.

384

.

Q. And you did stay aboard? A. I stayed aboard Monday night.

Q. In the radio officer's quarters? A. In the radio officer's quarters.

Q. And no Kozel? A. No. Kozel was not—the first and the only time I have [200] ever seen Kozel was Thursday night when I had spoken to him when I had come aboard the Frances on Thursday night.

.

Q. (By Mr. Geltman) Let's refer to the April incident. Now come to the day, April 26, when you went down to

look at the Semmes; you came back, stopped off at the Bull Line, subsequently telephoned Mr. Howe.

In that conversation did Mr. Howe make any reference to the job you had been offered on the Waterman Line ship, the Semmes? A. Yes. In the course of the conversation he says, "You were given a job on a Waterman Line ship. Why didn't you take [201] that job?"

And then I answered that the ship had been—the ship was all fouled up, had been having trouble on it, and I decided not to take it.

* * * * *

Q. (By Mr. Geltman) That was the occasion he hung up and you called him back; is that right? A. That's right.

Q. He hung up in the middle of the conversation. A. In the middle of the conversation.

Q. And after he hung up and you called him back, did you speak very long? A. No, not very long.

Q. How long? What happened after you called him back? A. Well, I called him back and I says, first I asked him, "Why are you trying to railroad me out of the union?"

And he says, "Fowler, why don't you go over and join the ACA? Maybe they will give you a job."

I said then, "Mr. Howe, is that your final decision on the whole matter?" I says, "Is this your final answer?"

He says, "Yes, and furthermore I haven't got all day to waste; I haven't got all day to waste time talking to you." [202] Well, I says in that case the only thing I can do is to turn the whole matter over to the National Labor Relations Board and see what they have to say about it.

* * * * *

(Examination)

Q. (By Trial Examiner Scharnikow) Let's see if I am correct on some points in your testimony, Mr. Fowler.

388

Willard C. Fowler, for Board, Redirect

When you came back in April, you called Mr. Frey, is that correct? That was the first thing you did? A. Yes. That is correct.

Q. And Mr. Frey told you that you should keep in touch with him, that something might turn up in the near future, in the next few days. A. No. He said to keep in touch with him, he says something will probably turn up in a few days.

389

Q. Then on Friday or Saturday you had this conversation with Mr. Howe at the union office? A. That's right.

Q. Did you tell Mr. Howe anything about what Mr. Frey had told you? [203] A. No, I did not. I did not mention it.

390

Q. Did you refer to the possibility—you, yourself, raise the possibility of your going to work for the Bull Line? A. Well, when I walked into—on that Friday or Saturday—I told Mr. Howe that I had come back and I was looking for a job. And Mr. Howe did not give me a chance to raise the possibility of working for the Bull Line because he had said, "We have plenty of jobs available but don't expect any clearance for the Bull Line for a Bull Line ship."

Q. Then on Monday, after you had taken a look at the Semmes— A. Yes, sir.

Q. (Continuing) —you went to the Bull Line office? A. That's right.

Q. And spoke to Mr. Frey? A. Yes.

Q. What did Mr. Frey say? A. He said, "We will have to—". He says, "We have a job—" He says, "I have a job for you but first of all you will have to [204] get a clearance from the union for it."

And I says, "Well, Mr. Howe has already told me—" I told Mr. Frey Mr. Howe had already told me I would not be given a clearance for a Bull Line ship but however

Willard C. Fowler, for Board, Redirect

391

I would see what I could do; I would ask him again to see if it were possible he had changed his view or his viewpoint in any way about me working for the Bull Line.

Q. After this conversation you spoke with Mr. Howe on the telephone? A. Yes.

Q. During that telephone conversation did you tell Mr. Howe that you had spoken with Mr. Frey? A. No, I did not get a chance to.

Q. You did not say anything about the offer of the job? A. No. I did not get a chance to say anything about it, the way the conversation went, I had no chance to.

392

Q. Did you speak with Frey after he told you he had a job on the Steamship Evelyn if you could get clearance and before you left for Miami?

* * * * *

The Witness: Yes, I did.

* * * * *

[205] Q. When was it? A. That was later that afternoon after the telephone conversation with Mr. Howe.

Q. What was that conversation? A. Well, I told him that I had just been read the riot act as far as me working for the Bull Line was concerned. And I said I was sorry about the whole business but there is nothing I can do without a clearance.

393

And he says, "Well, you might try United Fruit here."

So I says, "Well, I will go over and take a look at them." I mean, "I will go over and contact them." I also mentioned the fact I was going down to Socony Vacuum because that—they might have something because I knew they did not have the same contract with the union that the Bull Line had.

* * * * *

394

Robert H. Frey, for Board, Direct

[209] ROBERT H. FREY (Board Witness)

.

[210] Direct Examination:

Q. (By Mr. Geltman) * * *

.

Q. Mr. Frey, you are employed by the A. H. Bull Steamship Company, are you not? A. Yes, sir.

395

Q. How long have you been employed? A. Since January 1, 1930.

Q. What is your position? A. Radio supervisor.

.

Q. What does your job generally entail, will you tell us, please? A. Well, supervision of all the radio stations in our mobile ship stations and hiring of personnel to operate these stations, maintenance and repair of radio equipment.

Q. You do that hiring of radio officers for the company, is that it? [211] A. Yes, sir.

Q. Have done so for many years? A. Yes, sir.

396

Q. Did you hire Fowler on the various ships for which he worked or on which he worked for the A. H. Bull Steamship Company? A. Yes, sir.

.

Q. (By Mr. Geltman) As part of your job do you keep in touch with the radio officers' situation on the various ships of the company, as to whether vacancies are expected? A. Yes, sir.

Q. That has always been part of your job? A. That's right. Unless in my absence on vacation or something like that, a position comes up and then the port captain undoubtedly takes—usually takes over.

Robert H. Frey, for Board, Direct

397

Q. But when you are around, it is your responsibility.

A. That's right, yes.

Q. I show you this telegram, General Counsel's Exhibit 3, and ask you whether you sent that telegram. A. May I refer to my copy?

.

[212] Q. (By Mr. Geltman) The exhibit just referred to does not have your name? A. Yes, but I did send that telegram.

Q. You did send that telegram? A. Sure.

398

Q. The telegram says:

"Proceed New York as soon as possible for position SS Frances,"

and was directed to Willard Fowler. A. That's right.

Q. Did you receive any communication from Fowler after this wire was sent? A. When he arrived in New York?

[213] Q. No, no. I refer to after the wire was sent. A. Oh, well, he telephoned me long distance and stated he would be up in answer to this telegram which I had sent, that is right.

399

.

Q. The position you were offered by that wire was that of radio officer on the Frances, wasn't it? A. That is correct.

Q. At the time you sent the wire, were you anticipating a vacancy in the position of radio officer on the Frances? A. Definitely.

Q. What, if anything, had happened to cause you to anticipate a vacancy in that position? A. Well, the operator that was on there previous to Mr. Kozel had been injured in New Orleans; and in talking to our agents in New Orleans it was requested Mr. Lopez be replaced by an operator.

400

Robert H. Frey, for Board, Direct

Q. Mr. Lopez is the one that was injured? A. Mr. Lopez is the one that was injured and the one that Mr. Kozel replaced and he was to go on board for that voyage only. That was to be the understanding.

Q. Who said that? A. I told the agents that was what they were to convey to [214] Lopez and to the union.

* * * * *

401

Q. (By Mr. Geltman) The week you sent the wire to Mr. Fowler, this wire you have just looked at, did you see Mr. Fowler? A. I saw Fowler on the following Saturday, which I believe was the 28th of February, if I am not mistaken.

Q. That is right. The 28th.

Do you know Mr. Howe? A. Yes, sir.

Q. Who is Mr. Howe? A. Mr. Howe is secretary-treasurer of the Radio Officers' Union.

Q. You have had lots of meetings with Mr. Howe? A. Yes, over a good number of years.

Q. The week you saw Mr. Fowler on February 28, did you have any conversation or conversations with Mr. Howe? A. It was on the day before, that was Friday.

402

Q. That was the 27th? A. 27th. Mr. Howe called me and asked me what I was trying to do, was I trying to run my own union because he had heard undoubtedly Fowler had been aboard the Frances as a replacement.

* * * * *

[215] Trial Examiner Scharnikow: Tell us what Howe said to you and what you said to Howe.

The Witness: Mr. Howe asked whether I was trying to run my own union, and I said no, I was not.

Q. (By Mr. Geltman) What did he then say? A. He said it looked that way, and he was not going to have any-

Robert H. Frey, for Board, Direct

403

thing of the kind taking place, such as Fowler replacing Kozel.

Q. What did you then say? A. Well, that was about the extent of the conversation at that particular time. * * *

Q. I show you this telegram, General Counsel's Exhibit No. 4, and ask whether you ever saw it before. A. Yes, sir, I have.

Q. That is the telegram which says, "You are—" directed to Fowler, signed by Fred. M. Howe, general secretary-treasurer, Radio Officers' Union, saying: "You are—" 404

* * * * *

Q. (By Mr. Geltman) When did you see that and where? A. On Saturday, the 28th of February on board the Frances at Pier 22, Brooklyn.

Q. Did you see Fowler at that time? [216] A. Yes. He was aboard the ship.

Q. How did you get to see this telegram? A. He showed it to me.

Q. Did you have a conversation with Fowler then at that time? A. Well, I could not understand the contents of the telegram exactly. And I asked Fowler whether he was in good standing with the union and requested him to show me his union card. And he had a union card showing his dues paid up. 405

Q. Did he show it to you? A. He showed it to me. His dues were paid up beyond the date of this particular telegram.

Q. While you were at the ship, did you look at the radio room? A. Yes, sir, I did.

Q. Did you find out whether or not Kozel was still there? A. Kozel was not there, neither was his baggage nor his license there. I found out from the officer of the ship he had left with his baggage.

406

Robert H. Frey, for Board, Direct

Mr. Geltman: In connection with the absence of the license, I wish to call attention particularly to Federal Communications Commission rule and regulation 8.63, Posting of Licenses.

407

It reads as follows: "The original ship radio station license and the original license of each operator of the ship station while he is employed or designated as radio operator [217] on the vessel, shall be posted in a conspicuous place in the associated radio operating room on board the ship, except when any operator license has been submitted to the Commission in accordance with relevant provisions of Part 13."

And then it has a provision which is not here applicable.

I may state I have shown this to Mr. Silverman, and it is a matter that I call to the Examiner's judicial notice.

Q. (By Mr. Geltman) Now, before the Frances left New York, did you get a replacement radio operator? A. Yes, we did.

408

Q. How did you arrange for that? You arranged for it, didn't you? A. Yes. I called the union and requested a replacement.

Q. When was this? A. This was on the afternoon of Saturday, the 28th, sometime after—well, after noontime and after finding Mr. Kozel was not there, I requested the union to give Fowler a clearance.

.

Trial Examiner Scharnikow: To whom did you speak?

The Witness: I spoke to Mr. Howe, and I requested Mr. Fowler be given a clearance for the Frances

Robert H. Frey, for Board, Direct

409

since Mr. Kozel had left or that Mr. Kozel be returned to the ship since Mr. Howe did not—was objecting to Mr. Fowler showing up [218] previously for the job.

And Mr. Howe said he would not give Mr. Fowler clearance for the ship.

And I said, "Very well. Send me another man."

Q. Did you know where Fowler was at that time, assuming the union had said, "Yes, you can have Fowler," did you know where to reach him? A. He was staying aboard the ship.

410

Q. How did you know that? A. Because I saw him and he mentioned he was sleeping aboard the ship.

Q. So the union sent you another man? A. Yes.

Q. When the new man reported, did he present a clearance slip from the union? A. Yes, he did.

* * * * *

[219] Q. (By Mr. Geltman) * * *

Will you tell me when the man was assigned by the company to that ship? A. The assignment letter is dated March 2, 1948.

411

Q. That means he was actually assigned by the company? A. That means he was assigned by the company effective as of March 2, 1948. That is the day he first started to draw pay.

Q. This man was Henry P. Miller, is that right? A. Yes. [220] Q. And he in fact thereafter did work on the Frances, did he? A. That's right.

Q. After this incident of late February and early March, did you have any contact with Mr. Fowler? A. He telephoned me some time after that, I don't know whether it

412

Robert H. Frey, for Board, Direct

was a day or two, and mentioned he was going to return to Miami.

Q. Beyond that period. A. I received a note from him some time later saying he was down in Miami and gave me a Miami address.

Q. Still later? A. I think the next one was a couple of months later.

Q. About a couple of months after the February incident? A. About a couple of months after the February incident, which would be around April.

413

Q. And what kind of contact was it? A. Well, it was a telephone call, telephone conversation when he called me on the phone on arrival in New York stating he was in New York and did not exactly know where he was going to stay at that particular time.

And I told him to get in touch with me later and let me know. He said he was up for a job, and I mentioned that there probably might be one showing up in a few days and if so, to let me know where he was so I could get in touch with [221] him and give him a call.

414

Q. After this conversation with Fowler, did you have an opening for any radio officer? A. Yes, we did.

Q. What ship and when? A. It was the Steamship Evelyn in Philadelphia, and it was around the 26th. I think I heard of it late on the 24th of April.

Q. When was that job on the Evelyn filled? A. The 27th of April.

Q. And who by? A. Frank Paese.

Q. When Paese reported for work, did he bring a clearance slip from the union? A. Yes.

.

[222] Q. On April 27 the company issued its assignment to Paese to work on the Evelyn? A. Right.

Robert H. Frey, for Board, Direct

415

Q. When you knew that you wanted to fill the job on the Evelyn, did you have any contact with the union? A. Yes. I called the union early on the morning of the 26th.

Q. That is Monday. A. That is on Monday, and I spoke to Mr. Glynn.

[223] Q. Who is Mr. Glynn? A. Mr. Glynn is Mr. Howe's assistant, I believe, or dispatcher for—

Mr. Geltman: Is that conceded?

Mr. Silverman: Oh, yes, yes.

416

The Witness: Dispatcher for the union. And I asked him whether Mr. Fowler was there or whether he knew where he could get hold of him because I wanted to get clearance for him for the Evelyn.

And Mr. Glynn did not make any comment. He said he would just see. And that was the extent of the conversation.

* * * * *

The Witness: Mr. Glynn mentioned that—well, in the first place, I asked whether Mr. Fowler was there or if he knew where he could get hold of him and if he could, why, I would like to have him cleared for the Evelyn position.

417

Mr. Glynn said he would see, and he made no further comment, as far as I recall.

Q. (By Mr. Geltman) Did you have any more contact with the union on that day? A. Mr. Howe called me up on the afternoon of the same date and mentioned he would not give Fowler a clearance for the Evelyn or for any other Bull Line ship.

[224] And I again requested that he assign some man to

that particular position because I wanted to get him down to Philadelphia on the 27th.

Q. On this same day was Fowler in touch with you? A. Yes, he was. He was in the office.

Q. When in point of time with reference to the Glynn conversation and the Howe conversation? A. As I recall it, probably sometime around noon or a little after noon.

Q. Between the two? A. Yes, between the two.

419 And he dropped in to see me about any retroactive pay or I suppose back overtime coming. And I directed him to the proper department where he could check up on that. At the same time I mentioned to him that I had a position open on the Evelyn for him and if he got a clearance from the union I would be perfectly willing to assign him.

Q. Did you have any further contact with Fowler on that day? A. Late in the afternoon he called me up on the phone and mentioned that he could not get a clearance from the union for the Evelyn or any Bull Line ship.

Q. When in point of time was this in reference to Howe's conversation? A. Well, it was after this Howe's conversation with me.

420 Q. What did you tell him—tell Fowler? [225] A. I told him I was sorry but I could not do anything without an official clearance from the union.

Q. Since Mr. Howe spoke to you on that occasion, has the union ever told you or the company so far as you know they would permit you to hire Fowler? A. No, sir; not to my personal knowledge, no.

Q. You are the person who— A. Not me personally, anyway.

Q. You are the person with whom they ordinarily have contact? A. Ordinarily, yes, sir.

• • • • •

Robert H. Frey, for Board, Direct

421

Trial Examiner Scharnikow: * * * Am I correct in my understanding [226] that you testified you had a conversation with Mr. Glynn on April 26?

The Witness: Yes, sir.

Trial Examiner Scharnikow: And in that conversation you asked for Fowler?

The Witness: Yes, sir, I did. I asked whether Fowler was at the union office or if they knew where to get in touch with him because he had not advised me as to his location.

422

Trial Examiner Scharnikow: After that, Fowler came in for his back pay.

The Witness: That is right, sir.

Trial Examiner Scharnikow: And you told him that you had a place for him on the Evelyn if he could get a union clearance?

The Witness: That is correct, sir.

Trial Examiner Scharnikow: And then after that Mr. Howe called you.

The Witness: Yes, sir. Or I called him. I don't recall. It was one way or the other.

Trial Examiner Scharnikow: You did have a conversation with Howe?

423

The Witness: That is correct, sir.

Trial Examiner Scharnikow: In which Howe said he would not give Fowler clearance for the Evelyn or any Bull Line ship?

The Witness: That is right, sir.

Trial Examiner Scharnikow: And then Fowler again called [227] you to tell you Howe said he would not give him clearance for the Evelyn or any other Bull Line ship.

The Witness: If I said that, I didn't mean that. What I said was that Fowler said he could not get

424

Robert H. Frey, for Board, Direct

any clearance for any Bull Line ship. I don't recall Fowler stating Howe said that.

Trial Examiner Scharnikow: Then your reply to Fowler at that point was what?

The Witness: That I was sorry I could not do anything about it unless he had an official clearance from the union.

Trial Examiner Scharnikow: Did you have any conversations or any communications with Fowler after that?

The Witness: With the exception that he called me and mentioned he was going back to Miami.

Trial Examiner Scharnikow: Was there any conversation at that time between you and Fowler as to a job with the Bull Line Steamship for Fowler?

The Witness: No. I made no mention that I would call him for another Bull Line assignment.

Trial Examiner Scharnikow: You made no such statement?

The Witness: I made no such statement, because I presumed from what he told me—

Trial Examiner Scharnikow: You made no such statement?

The Witness: No.

Trial Examiner Scharnikow: You did not discuss the [228] possibility of his being hired by the Bull Line Steamship Company?

The Witness: No.

Trial Examiner Scharnikow: Nor did he make any mention of that possibility?

The Witness: No, he did not either. That is, not to my knowledge.

• • • • •

Robert H. Frey, for Board, Cross

427

[229] Cross Examination:

• • • • •

Q. (By Mr. Silverman) • • •

• • • • •

[230] Q. Do you have any record of Mr. Kozel's signing off the ship at any time prior to February 26th? A. He signed off the Articles and was paid off on February 26, 1948.

• • • • •

428

Q. Was anything called to your attention to the effect that Mr. Kozel was satisfactory to the skipper of the Frances? A. Yes. His services were satisfactory.

• • • • •

[231] Q. When you dispatched this telegram to Mr. Fowler on February 24, had anything been done in the direction of discharging Mr. Kozel or accepting his resignation? A. I spoke to Mr. Kozel on board the ship and mentioned that—

Trial Examiner Scharnikow: When?

The Witness: That was probably the 24th or 25th.

429

Q. (By Mr. Silverman) What did he say? A. I told him I had sent for a man with senior service in the company to replace him since he was there only for that one voyage only and that was the understanding in New Orleans.

Q. What did he say? A. He did not say anything in particular. He sort of more or less seemed a little perturbed. And I said, "Well, now, you have been satisfactory but if the union sees any differences," I said, "why don't you call the union up? I think it would be a good idea."

That was about the extent of our conversation and every-

430

Robert H. Frey, for Board, Cross

thing was very friendly and no arguments one way or the other.

.

[233] Q. The next call you received from Mr. Howe that you have testified to was a call on Friday, February 27, is that correct? A. That's right.

Q. And during the course of that conversation, Mr. Howe told you that he was not going to stand for Fowler replacing Kozel, was that the substance of the conversation? A. That is the sum and substance of it.

431

Q. Did he also tell you that Kozel had protested this [234] replacement of him by Fowler? A. I don't recall whether he made that statement. He may have said that.

Q. You got that impression? A. That would be the general impression since I surmised Kozel had gone to the union, which was at my suggestion.

Q. What did you say to Mr. Howe when he told you of his protest against having Mr. Kozel replaced by Mr. Fowler? A. I requested then that if he felt like that about it, we would leave Kozel stay there.

.

432

Q. Did I understand you correctly to testify that before the Frances left New York, you again called Mr. Howe and requested a clearance for Fowler? A. That was on Saturday, yes, sir.

Q. What? A. After I had seen the telegram that was sent to Mr. Fowler, at Pier 22, Brooklyn.

Q. And with whom did you have the conversation at that time? A. I am quite sure it was Mr. Howe.

[234] Q. What was said? A. Mr. Howe refused to give clearance to Mr. Fowler for the Frances; at which time I requested he assign another man or send Kozel back.

.

Robert H. Frey, for Board, Cross

433

[236] Q. Now you know, did you not, that before assigning a man [237] to a vessel owned by your company you were obligated to procure a clearance from the union? A. Well, sometimes clearances were dispensed with.

Q. Yes, but generally you knew— A. Generally speaking, there was always a clearance issued.

• • • • •

[238] Q. Now, coming to the April incident, when Mr. Fowler first arrived in New York, he phoned you; is that correct? A. That's right.

434

Q. Said he was in town. A. Yes, sir.

Q. Asked you whether there was anything doing? A. Yes, sir.

Q. And you told him at that time to keep in touch with you; is that right? A. That is correct.

• • • • •

[239] Q. You merely suggested he keep in touch with you? A. Keep in touch with me in case something opens up, why I may have a position for you.

Q. Then April 26 came along and you telephoned the union; is that right? A. That's right.

435

• • • • •

Q. (By Mr. Silverman) You had at that time already received this telephone call from Mr. Fowler so that you knew he was in town? A. I knew he was in town some place.

Q. And when you telephoned on the morning of April 26, do you [240] recall what time it was? A. Well, it was probably around 9:30, 9:15, 9:30, something like that.

Q. Might it have been any later than that? A. I hardly think so.

Q. Did you have any opening at that time for a ship? A.

Robert H. Frey, for Board, Cross

At that time I had because I had heard about it late Saturday.

Q. And when you called the union office, you spoke with Mr. Glynn; is that right? A. Mr. Glynn, that's right.

Q. Can you tell us, as nearly as you can remember, precisely what it was you said to Mr. Glynn when he answered the phone? A. Well, I asked him if Mr. Fowler was there.

Q. What did he say? A. He did not say whether he was or whether he wasn't. But I think he mentioned—I believe offhand he said he would take a look and what I actually asked was Mr. Fowler there and if not, would he know where I could get in touch with him because I would like to assign him to the Evelyn in Philadelphia.

Q. You said all that in one sentence, Mr. Frey? A. Undoubtedly I did.

Q. Do you have any recollection of Mr. Glynn saying to you that Mr. Fowler had left, just a few moments before, and had taken an assignment to a Waterman ship? [241]

A. No.

Q. You have no recollection of that? A. No.

Q. And you state definitely that on the morning of April 26 you mentioned the steamship Evelyn? A. Yes.

Q. When had the steamship Evelyn docked? A. She docked on the 26th in Philadelphia, as I recall offhand. Without the daily log in front of me, I would not say whether it was early on the 26th or late on the 27th.

Q. When was the Evelyn scheduled to depart again? A. Undoubtedly probably the 28th or 29th.

Q. When was Mr. Paese assigned to the Evelyn? A. The 28th, I think, wasn't it?

No, the 27th.

Q. 27th. And after Mr. Glynn said, as you have testified, he would look and see whether Mr. Fowler was there, what

did he then tell you? A. I think he mentioned he was not there. And I mentioned that if he came in, why, I would like to have him assigned to the Evelyn.

.

[242] Q. And you have no recollection of Mr. Glynn mentioning anything to you concerning the fact Mr. Fowler had accepted an assignment to a Waterman ship? A. No.

Q. Did Mr. Glynn say anything to you as to whether Mr. Fowler had been there that morning? A. I don't recall that he did.

440

Q. Did you get the impression from Mr. Glynn that Mr. Fowler had been there but had departed? A. No, not that I recall.

Q. Did you ask? What did Mr. Glynn say to you when you asked him if he knew where he could get in touch with Mr. Fowler? A. He did not mention that he could get in touch with him.

Q. Did you ask Mr. Glynn whether he knew where he could get in touch with him? A. Yes, I did because I did not know where I could get in touch with Mr. Fowler myself, although I knew he was in town.

441

Q. What did Mr. Glynn say in answer to that question? A. I think he said he would look it up, something to that effect, which is undoubtedly what he would say, I am pretty sure.

.

[243] Q. Now, sometime that morning Mr. Fowler dropped into your office, isn't that so? A. That's right. It was not in the morning. I think it was after 12 o'clock noon sometime.

Q. He came in to discuss some question of back pay with you or overtime? A. He wanted to check over and see if he had any coming to him, yes.

442

Robert H. Frey, for Board, Cross

Q. What did you say to him when you saw him on that occasion? A. I told him I recall where he could go and check up on that back pay and overtime, if any, and I mentioned I had a ship in Philadelphia, the Evelyn, if he could get a clearance for it from the union, I would assign him to that vessel.

.

443

Q. When Mr. Fowler came into your office on that occasion when he discussed his back pay, did you then call the union [244] and advise them that Mr. Fowler was there and you wanted a clearance for him for the Evelyn? A. No, I did not, because I depended on him to go up to the union and get the clearance. I told him I would call the union later and let them know that I wanted him although I had already told them in the morning that I wanted him. I was going to sort of brief them again to find out whether or not they had found him, whether he had arrived up there. In the meantime, Mr. Howe and I talked together and Mr. Howe said he would not give Mr. Fowler a clearance for the Evelyn or any Bull Line ship. So far as I was concerned, I just mentioned then just send me another man.

444

Q. The only thing Mr. Howe said to you was that as far as the union was concerned, they would not give Fowler a clearance for a Bull Line ship? A. For the Evelyn or a Bull Line ship.

.

[246] Q. During the conversation with Mr. Glynn on the morning of the 26th, did you specifically ask Mr. Glynn for a clearance for Mr. Fowler? [247] A. I asked Mr. Glynn if Mr. Fowler were there or if he knew where he could get in touch with him and if he could get in touch with him, I would like to have a clearance for him for the Evelyn.

Q. Do you know from your dealings with the union that

Fred M. Howe, for Board, Direct

445

clearances are granted at the union office; isn't that so? A. Yes, because they are always signed by Mr. Howe or Mr. Glynn.

Q. When you saw Mr. Fowler again on that afternoon, did you suggest to Mr. Fowler he go up to the union office?

A. I did not.

Q. And ask for a clearance? A. I presumed he would go because I told him if—that I had a job on the Evelyn, that if he got a clearance for the Evelyn, I would assign him to the vessel.

446

• • • • •

[265] FRED M. HOWE (Board Witness)

• • • • •

Direct Examination:

• • • • •

[266] Q. (By Mr. Geltman) Mr. Howe, you are the secretary-treasurer of the— A. I am the general secretary-treasurer.

Q. (By Mr. Geltman) Of the Radio Officers' Union. A. Of the Radio Officers' Union.

447

Q. The respondent in this case? A. Of the Commercial Telegraphers' Union, AFL.

Q. What are your duties, Mr. Howe, as general secretary-treasurer?

• • • • •

The Witness: I negotiate all the agreements and sign all of the agreements between the union and the company; take care of the funds and property of the union; and have general supervision of the representatives and the paid employees of the organization.

Mr. Geltman: I wish to call the Trial Examiner's

448

Fred M. Howe, for Board, Direct

[267] attention to the fact I intend to assert the rights under the Section 43(b) of the Rules of Civil Procedure in the examination of this witness.

.

[268] Q. (By Mr. Geltman) Mr. Howe, you assign unemployed union members to jobs, do you not, when they come in and you have jobs available? A. I do when I am there and if I am not there, then my assistants assign such members.

.

449

Q. Back in the first half of 1948 that covers the period of these incidents which we have been discussing, when a job applicant showed up and asked you for a job, what did you do? A. If a man showed up looking for a job, we placed his name on a list. We had a list that we maintained at that time, and we endeavored to give jobs out in rotation to the best of [269] our ability.

If a man come in, if we had a job that had to be filled, we asked him if he wanted the job; being careful, of course, to give the job to the number one man if he was available.

450

At that particular time, in the first part of 1948, jobs were so plentiful we sometimes had to beg men to take them.

.

Q. If a man showed up who was not a paid up member do you [270] send him out on a job? A. We did that on many hundreds of cases.

Q. You— A. We sent out men during the war by the hundreds who were not even members of course, but we urged the men to pay up their dues.

Q. Let's refer to 1948. A. Yes.

Q. How about 1948, this first half of 1948? A. Is there some special—

Fred M. Howe, for Board, Direct

451

Q. No. I mean what was your practice? If you had a man that came in and wanted to get a job. A. I will tell you what my practice is if you will let me.

Q. Go ahead. A. Everybody is supposed to be paid up in his dues. We had men, such as one I will describe very briefly, who had been in the hospital two or three operations. Unable to pay his dues, and I gave him a job under protest of a great many members. I don't say a great many—a few members—who thought he should be paid up. When I explained the man had a pretty hard time, they said, "O.K., let him take the job." 452

That is the practice. The practice is for them to be paid up, and if there is a special case like the one I mentioned, we tell him to pay when he comes back.

• • • • •

[272] Q. Where you have these applicants all paid up and in good standing, what is the basis on which you pick one? That arrangement you described to me before? A. Well, every man that wants to ship out, his name is on a list. It was on the list. We don't maintain such a list at the present time because we have what we refer to as shipping dates, which is similar. 453

Trial Examiner Scharnikow: I think Mr. Geltman is asking you about the practices in February, March and April of 1948.

The Witness: Every man who was entitled to a job had his name on the list.

Q. (By Mr. Geltman) And the basis on which you gave out the job was that you described to me before? Your consideration [273] of how long a man was on the list— A. He could ship out regardless what his dues standing was.

454

Fred M. Howe, for Board, Direct

Q. You mean to say if you had a man who was junior on the list— A. What do you mean by “junior on the list”?

Q. Who had been on the list for a lesser time—let us say one day—and had a man on the list for one month, and they both wanted the same job and the man who was on the list for a longer time was not paid up in his dues, you would ship him out? A. The man who was longest out of work and his name was on the list would be entitled to the job if he wanted it.

455

Q. Regardless of good standing? A. Of what?

Q. Regardless of good standing? A. Yes, that is right. If we put him on the list, he could ship out.

Trial Examiner Scharnikow: Say a man came in on a particular day, did his position on the list depend on the day he came in to see you or on the day he told you he had last shipped?

The Witness: The day he left his last ship would determine his position on the list.

Trial Examiner Scharnikow: So that a man who came in today, who had just left his last ship yesterday—

456

[274] The Witness: He went to the bottom of the list.

Trial Examiner Scharnikow: He went to the bottom of the list.

The Witness: But if he come in today and told me he got off his ship two months ago, he would not get this same number; he would go higher on the list.

Trial Examiner Scharnikow: He would go higher than the man who registered yesterday.

The Witness: And who got off yesterday.

Trial Examiner Scharnikow: And who got off yesterday.

Fred M. Howe, for Board, Direct

457

The Witness: Yes.

Trial Examiner Scharnikow: It was not the date of registering at the union that determined the position on the list but the date when he last left his ship?

The Witness: The last day he left a ship determines the number he gets on the list.

Trial Examiner Scharnikow: So your list keeps shifting then? Your list does keep shifting.

The Witness: Yes. It keeps changing.

Trial Examiner Scharnikow: A man's position may go up and down on that list? 458

The Witness: Right now it is stationary. Oh, yes, it could change.

Q. (By Mr. Geltman) Is it your testimony it did not make any difference whether the man was in good standing or not, [275] you sent him out regardless? A. If the union placed his name on the list, my testimony was he could ship.

Q. Regardless of his standing? * * *

* * * * *

[276] Back in February, 1948, you sent Fowler a wire, didn't you? A. Yes. 459

Q. I will show you the wire. A. Yes.

Mr. Silverman: It is General Counsel's Exhibit No. 4.

Q. (By Mr. Geltman) General Counsel's Exhibit No. 4. A. I sent the wire, that's right.

Q. How long after you sent Fowler that wire did he come in to [277] see you?

460

Fred M. Howe, for Board, Direct

Trial Examiner Scharnikow: First, did he come in to see you.

The Witness: That is in February?

461

Q. (By Mr. Geltman) Yes, that is right. A. To my recollection, Fowler called me on the telephone the same day and to my recollection he came to see me on the same day. That was a Friday, I believe. That was Friday, the 27th, the day I sent the telegram. And I feel certain that was the day he called me on the telephone and we had a talk.

Q. Well, suppose you describe that talk to me?

.

The Witness: I asked him why he had gone aboard this ship attempting to deprive another member of a job.

462

Mr. Fowler was very nice about it. He said he did not know there was anybody on the ship. And he said had he known anyone was on the ship, he would not have come all the way from Miami to New York to take it. And, due to the trouble which had—it had developed—he said he was not going to take the job and he would return to Miami. He said he had some important work to do in Miami, and he would return there and [278] do that work. Then he would come back to New York and ship out.

During that conversation, Mr. Fowler and I discussed the Bull Line. He said he wanted to work for the Bull Line. And I told Mr. Fowler we had no objection of him working for the Bull Line or anyone else but what we did object in his case and in other cases was “bumping” other members who took the jobs in good faith. We did not object to Mr. Fowler taking any Bull Line job. But I told Mr. Fowler

Fred M. Howe, for Board, Direct

463

neither he nor anyone else would be allowed in the future to "bump a man" off when the man was given the position on a permanent basis, we wanted to know that he was going to hold that job. That is what we told Mr. Fowler.

And Mr. Fowler still said he wanted a Bull Line ship.

And I says, "We do not have any Bull Line ship at the moment. Kozel is on the ship." And he was, as far as I knew.

464

And we discussed other jobs. I explained to Mr. Fowler that the Bull Line was not the only company that a man could work for. I said several men in the Waterman Line who seemed to think that the Waterman Line is the only company in the world; others that work for the Standard Oil of New Jersey think they must work forever for that particular company; others that work for the United States Line, they must work for that particular line. They would not work for the Bull Line. I told Mr. Fowler he and every other member should get this [279] out of their head because all the lines had signed the same contract, identical, word for word, and that as a matter of fact it would do him a lot of good and everybody else, and I recommended to everybody that they diversify their employment.

465

Trial Examiner Scharnikow: This is what you told Fowler now?

The Witness: Yes. We had a long discussion.

Q. (By Mr. Geltman) Did you offer him any other job?
A. I told Fowler he could get a job any time by just asking for it. Shipping was good in February.

466

Fred M. Howe, for Board, Direct

Q. Starting with then— A. I don't know whether I had a job at that minute, but he did not have to wait very long.

Mr. Fowler agreed to everything that I explained to him.

He said he thought he had worked for the Bull Line too long, he was becoming narrow, that he would ship on some other line for the experience. And he went away very happy, pleased at the discussion. I think he has testified to that effect here already. There was no animosity.

* * * * *

467

[280] Q. So you were interposing no obstacle to clearing Fowler [281] at the time he came to the office for a job; is that right? A. No. I offered him a job.

Q. Had there been any change in Fowler's status between the time you sent him the telegram and the time you offered him the job as you just testified? A. Yes.

Q. Why? A. He was suspended from membership in the telegram, and when I had the discussion with him, I lifted the suspension.

Q. After you had the discussion with him, which, according to your recollection, was the same day, you lifted the suspension? A. Yes, yes.

468

Q. And thereafter, he was the same as anybody else, and you had no objection to his having a job? A. No. That is right.

Q. From the time he got the telegram to the time you did lift the suspension later that same day, is it your contention he was actually in suspension?

* * * * *

The Witness: I would say he was under state of suspension [282] for a few hours. Not very many.

* * * * *

Q. (By Mr. Geltman) You listed the suspension yourself, didn't you? A. Yes, I did.

Q. You, yourself, imposed the suspension, didn't you? A. Yes.

.

Q. . . . Who told you that Fowler was trying to get Kozel's job? A. Kozel himself.

Q. How long did he tell you that before you sent that telegram? A. Kozel was in to see me three different times, on three separate days, and I think there was a day or two extra—not three consecutive days. He was in there three times complaining that Mr. Frey had told him he might be fired.

470

[283] Q. Did you send this the first time you heard from Kozel or the last time? A. Send the telegram?

Q. Yes. A. I think it is in evidence there.

Q. But with reference to the time Kozel was there to see you, how long after that? A. It was after his second visit. In fact, it was during his second visit. He was there when I sent it.

Q. So it is your testimony you sent the telegram and you suspended Fowler all by yourself and you lifted the suspension all by yourself? A. Yes.

471

.

[284] Mr. Geltman: Do you have a copy of the constitution?

.

Trial Examiner Scharnikow: Suppose you mark it. How many pages there?

Mr. Geltman: There are three.

[285] Trial Examiner Scharnikow: Mr. Reporter, will

472

Fred M. Howe, for Board, Direct

you please mark it 13A, 13B and 13C for identification?

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 13A, 13B and 13C for identification.)

* * * * *

473

Q. (By Mr. Geltman) Is this a copy of your constitution, Mr. Howe? A. This is a copy of the constitution of the Commercial Telegraphers' Union, the parent organization of the Radio Officers' Union.

Mr. Geltman: I offer it in evidence.

The Witness: The Radio Officers' Union has by-laws.

Mr. Geltman: That is right.

* * * * *

[287] Trial Examiner Scharnikow: Are you marking and offering a copy of the by-laws of the Radio Officers' Union also?

474

Mr. Geltman: Yes. I intend to do the same with the by-laws.

Trial Examiner Scharnikow: Suppose you have it marked, and then if you see fit, you may offer the two exhibits.

Mr. Geltman: Mr. Reporter, will you please mark this as General Counsel's Exhibit 14.

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

Fred M. Howe, for Board, Direct

475

Q. (By Mr. Geltman) Mr. Howe, is this a copy of the by-laws of the Radio Officers' Union? A. Yes.

Q. They cover the period in question in 1948? [288]
A. Yes.

.

Trial Examiner Scharnikow: I will overrule the objection and admit in evidence General Counsel's Exhibit 13A, 13B and 13C, and Exhibit No. 14.

(Whereupon the documents previously marked General Counsel's Exhibits Nos. 13A, 13B, 13C and 14 were received in evidence.)

476

Q. (By Mr. Geltman) Now, in the light of your testimony that you did this—the suspension and the remission of suspension all by yourself, * * *

Q. (By Mr. Geltman) I want to say that I have run through the articles heretofore referred to with respect to suspension and find nothing which tends to show you have authority; and I want to ask you whether you can find anything, looking at this copy of the by-laws—

.

Q. (By Mr. Geltman) (Continuing)—which indicates you had such authority?

477

.

Mr. Silverman: We have Article 7.

[289] Trial Examiner Scharnikow: Go ahead, Mr. Howe.

The Witness: The General chairman has the sole right to suspend a man from membership except when he is not present I have that right. That is in the by-laws.

478

Fred M. Howe, for Board, Direct

Q. (By Mr. Geltman) Will you show it to me, please?

Trial Examiner Scharnikow: Where is it?

• • • • •

[290] Q. (By Mr. Geltman) That still does not recite the duty or the right of the general chairman. You say the general secretary-treasurer shall act as chairman.

• • • • •

479

The Witness: Section 7, Article 7: "The general secretary-treasurer shall act as general chairman in all absences of the General Chairman."

• • • • •

Trial Examiner Scharnikow: Since I have the exhibit here, I will permit counsel to point out what he regards to be the material portion of the exhibit.

Mr. Silverman: Mr. Trial Examiner, in conjunction with Section 7 of Article 7 must be read Section 3 of Article 7 which is before the Trial Examiner and which provides for the immediate suspension of any member whose activities are such—

480

Trial Examiner Scharnikow: I have it here.

[291] Mr. Silverman: (Continuing)—that the best interests of the union are endangered.

I might also refer the Trial Examiner to the provisions of Section 1 of Article 17 of the by-laws.

• • • • •

Q. (By Mr. Geltman) (Continuing) Of General Counsel's Exhibit 14, Mr. Howe, I read that any member violating the by-laws and so on shall first be advised by the officer of the Radio Officers' Union first having knowledge

Fred M. Howe, for Board, Direct

481

of the foregoing to correct his dereliction, and if such is persisted in and not abated, the member shall be immediately suspended by the general chairman and have charges brought against him as provided in Article 7.

[292] I want to ask you, in the light of that: your first notice to Fowler was, was it not, the telegram? A. No. I do not consider that to be the first.

Mr. Fowler had been a member of the union for five and one half years, and when he joined the union, he signed an application blank for membership that he would live up to the rules.

482

Q. Did you give him any other notice before the telegram? A. He received notices for five and one half years, monthly magazines, all kinds of official bulletins.

Q. Let's stick to the February incident.

On that occasion, did you give him any other notice than the telegram? A. He received the usual bulletins that go out in the month of February.

Q. Did you give him any notice with respect to the taking of Kozel's job other than the telegram? A. No. I did not mention Kozel, no. Didn't know about Kozel at the time.

483

Q. Then the telegram was the only communication you had with Fowler up to that point? A. No, not the only communication.

Q. In February? A. I met Mr. Fowler many times and we discussed various matters over the years.

[293] Q. I know that, but I am talking about— A. The first of the—

Q. The February incident. A. What date are you talking about now?

Q. You sent Fowler a telegram dated February 27. A. I sent him nothing else on that particular date.

484

Fred M. Howe, for Board, Direct

Q. You sent nothing to him prior to that? A. Not that particular date.

Q. You had no conversation with him prior to that time, on or about that date, prior to that date, did you? A. You say prior. That covers a lot of territory.

Q. In the few days preceding. A. How many days?

Q. In a day or two before the telegram was sent. A. No.

485

Q. So that was the first notice you sent to him, starting with the day or two preceding that day? A. Yes.

.

Q. (By Mr. Geltman) Now, referring to Article 7, Section 3, which provides the general chairman shall with the consent of [294] the general committee, suspend immediately any officer or member of the Radio Officers' Union whose activities are such and so on.

You have told me, haven't you, that you did this all by yourself? A. That's right.

Q. You did not have anybody else's consent? A. No.

.

486

[295] (By Mr. Geltman) In any event, Mr. Fowler was unsuspended after he saw you, when he saw you; isn't that right? A. He was restored to good standing, yes.

.

[296] Q. (By Mr. Geltman) You did not clear anybody for that job until you cleared Mr. Miller; isn't that right? A. Miller was cleared for the job.

Q. And that was about half past three on Sunday, March 1, isn't that right? A. Roughly, I believe. Whatever this says, that is about the right time.

.

Fred M. Howe, for Board, Direct

487

The Witness: 3:35 p. m., March 1, 1948.

Q. (By Mr. Geltman) So that if you lifted the suspension a few hours after the telegram on Saturday, there was a substantial time between the lifting of the suspension and the time when Miller was assigned to the job, wasn't there? A. Yes. A couple of days or so.

Q. Before clearing Miller for the job, did you make any attempt to locate Fowler? A. Mr. Fowler said he was returning to Miami, and I assumed that is where he went to.

488

Q. Did you send him any wire to the ship? A. No.

* * * * *

[297] Q. Did you get in touch with the company and tell them insofar as the company was concerned Fowler being in good condition could have the job? A. I do not recall that I did. I didn't know that Kozel had left the ship at that time.

Q. You had sent the wire to Fowler first right to the ship, hadn't you? A. That's right.

Q. So you knew he was there at that time? A. Yes. Kozel said he was on board. Kozel was in my office when I sent the telegram. He had just come from the ship and said Fowler was on board.

489

* * * * *

[302] Trial Examiner Scharnikow: Mr. Howe, in your practice in making these assignments and giving clearances, making the selection of men to go out on jobs, was it for you to make the assignment only to the men who were in the office at the time or to run through the list and get in touch with those that happened to be at the top of the list?

Fred M. Howe, for Board, Direct

The Witness: It depended greatly on the state of shipping at the moment. If we were short of men. we had to call outside. But if the company wanted a man in a big rush, we had to fill the job with the nearest available man. In almost every case, the company wanted a man in two hours. We haven't got time to call Miami and get Mr. Fowler up here. We have to take a man who is immediately available, and he must live in a hotel close by if he has got to move his baggage. It all depends on the job and the situation in regard to shipping at the time.

• • • • •

[303] Trial Examiner Scharnikow: In filling that job, you would then send the man who was on the top of your list.

The Witness: If he was available.

Trial Examiner Scharnikow: If he were available. Assuming there were men in the office when such a call came in but there were men who were not in the office who were higher than the men in the office on the list, would you call out and get those other men?

The Witness: I will have to repeat my reply again that it would depend on where these men were.

The man who has number one on the list might be in Pittsburgh or be in Miami, as Fowler was. In that case I judge the time.

If Mr. Frey said, "I want a man down here right away to ship and the ship sails at five o'clock," that is a special [304] problem. If he says three or four days, we have a chance to get Fowler up, from

Fred M. Howe, for Board, Cross

493

Miami, as an illustration. We try to go by the list the best we can but we have to fill jobs regardless of the list.

Trial Examiner Scharnikow: In other words, you try to get the man highest on your list.

The Witness: Who is available.

.

[309] Mr. Geltman: Counsel for the respondent union and I have just stipulated that respondent's record concerning the date when the assignment on the Semmes was offered to Mr. Fowler bears the date April 26, 1948.

494

Is that true?

Mr. Silverman: That is true. And so that the record may be clear, we have referred at various points in the record to the S. S. Semmes or actually the correct name of the ship is the S. S. Raphael Semmes, and may it be understood whenever we have referred to the Semmes it is the S. S. Raphael Semmes we have been referring to.

Trial Examiner Scharnikow: Is it agreeable?

Mr. Geltman: I so stipulate.

495

.

Cross Examination

Q. (By Mr. Silverman) Mr. Howe, when this telegram, General Counsel's Exhibit 4, was dispatched to Mr. Fowler, is it correct that Mr. Kozel was in your office at that time? [310] A. Yes, he was.

Q. As you understood it from him, had he just come from the S. S. Frances? A. Yes.

Q. Was it on the basis of the information he gave you

496

Fred M. Howe, for Board, Cross

that you believed that Mr. Fowler was on the Frances?
A. Yes.

.

497

Q. Was there any reason that prompted you to send that telegram other than the complaint that you had received from Mr. Kozel to the effect that Mr. Fowler had come aboard that vessel to replace him against his—that is, Kozel's—will? A. That was a climax to a series of “bumpings” as we call them, by which one man gets another man's job and is not entitled to it. Mr. Fowler in my opinion was trying to “bump” [311] Kozel with the aid of the company. We had several reports over the years to that effect.

.

[312] Q. (By Mr. Silverman) Mr. Howe, was any member of the union who was complying with the shipping rules adopted by the New York office of the union permitted to go aboard a ship for the purpose of working on that ship without having obtained a clearance from the union? A. No, not at all.

498

Q. Was every member who was complying with the shipping rules of the union required to notify the union when he left a ship? A. Yes. Before he left the ship.

Q. And was not one of the purposes of that rule to assure the [313] fact that no one, no member of the union, would be granted a clearance for a ship until the previous operator had signified his intention of leaving that ship? A. That was one of the important reasons, yes.

Q. These rules that were in practice and followed by the New York office of the Radio Officers' Union were provided for under the provisions of the by-laws of the Radio Officers' Union—I am referring particularly to section 19—were they not? A. Yes.

.

Fred M. Howe, for Board, Cross

499

Trial Examiner Scharnikow: Do you want to indicate the portion of the by-laws to which you have reference?

Mr. Silverman: I would like to, all right. Article 19, Section 3.

• • • • •

[318] Q. (By Mr. Silverman) Will you tell us, Mr. Howe, the practical method of application and interpretation of the provisions of the agreement between the union and the companies with whom it was under contract pertaining to employment practices as defined in the agreement and as actually practiced between the union and the companies? [319] A. Well, the companies telephone the union in New York and any port where we maintain an office, they telephone the union and they ask for a radio officer.

500

Trial Examiner Scharnikow: You are telling us now what actually happened, aren't you?

The Witness: Yes. There have been cases where a company has asked for a certain individual. That is not very frequent, however. In fact, it is very, very infrequent. They do not call up and say, "We want Mr. Joe Beef," or "We want Mr. Fowler." They call up and say, "Send me down a radio officer."

501

Trial Examiner Scharnikow: What happens in the case where they do ask for a specific man?

The Witness: We will ask them why they prefer this man or we will endeavor to get hold of the man, if we can, if he is available, we try to get him for the company. But we do like to know the reason why they want a certain individual.

502

Fred M. Howe, for Board, Cross

Trial Examiner Scharnikow: Do you clear a man in that case at the instance of the company in spite of the fact he is not at the top of the list?

The Witness: We have cleared many hundreds of them. I can say at this time some of the members don't think too much of that system.

Trial Examiner Scharnikow: You have done it?

The Witness: We have done it, yes.

503

Q. (By Mr. Silverman) Was that prevalent primarily in the [320] days of the war when there was no— A. It was more so—it was more so during the war than it is now. We did not object to it then at all when—because there was a shortage of men anyhow, and sometimes these calls came through because the captain took a liking to the radio officer. They went to the same—

Trial Examiner Scharnikow: You have done it in a number of instances in any event.

The Witness: Yes.

* * * * *

504

Q. (By Mr. Silverman) Now I want to get back to this February incident, after the sending of the telegram and your conversation with Mr. Fowler.

When that conversation ended, did you have any knowledge of where Mr. Fowler was going? A. He said he was going home. To me that meant Miami.

Q. Did you at that time know whether Mr. Kozel was going to return to the Frances or not? [321] A. My information was that he was still on board because when I sent the telegram on the previous day, they had been sent because he did not want to lose his job, so I assumed he was still on the ship.

Fred M. Howe, for Board, Cross

505

Mr. Geltman: Who is this?

The Witness: Kozel.

Q. (By Mr. Silverman) And when did you learn for the first time that Mr. Kozel was not going to sign on the ship again? A. Kozel contacted me in person. I just forgot what date that was, whether it was Saturday or Sunday or Tuesday. I don't have that in my mind. But he did contact me in person, I recall that, and he already had his transportation to New Orleans, I believe it was, and he told me he was leaving, he had gotten fed up with so much trouble. And so I asked him then why he had gone to so much trouble if he didn't want the job. And he said, "I wanted the job but I would not want to sail the ship now after all this trouble because I feel I am not wanted on the ship and the captain might ride me, or the company might make it miserable for me."

506

* * * * *

[322] Q. (By Mr. Silverman) Do you know or do you have any recollection at this time as to whether this conversation that you had with Mr. Kozel concerning the fact he was returning to New Orelans occurred before or after the talk with Fowler? A. After.

507

* * * * *

[325] Q. (By Mr. Silverman) There came a time, Mr. Howe, on April 26 when you had a conversation with Mr. Fowler concerning an assignment to the S. S. Raphael Semmes, is that right? A. That was in the afternoon of the 26th over the telephone.

Q. That's right. To the best of your recollection had you had any personal conversation with Mr. Fowler prior to the afternoon, the telephone conversation on the afternoon of April 26th? A. No.

508

Fred M. Howe, for Board, Cross

Q. Do you have any recollection of any visit to your office by Mr. Fowler on the Friday or Saturday morning before April 26, 1948? A. No, sir.

.

[326] Q. Do you have any recollection of a conversation in which Mr. Fowler argued with you or discussed with you his right to an assignment to any ship that he pleased prior to April 26th? A. I did not see Mr. Fowler during the month of April at all to my recollection.

509

Q. You had a phone conversation with him? A. A short, brief telephone conversation.

Q. Did Mr. Fowler ask you for a clearance for the S. S. Evelyn at any time during the course of that telephone conversation? A. No, sir, he did not.

.

[327] Q. Do you recall any conversation with Mr. Fowler during the [328] course of which he said to you in words or substance, that he wanted, as a member in good standing, to be cleared to a Bull Line ship? A. Over the telephone, he said he would like to work for the Bull Line. I said, "How are you going to work for the Bull Line when I don't have any Bull Line ships today?"

510

Mr. Geltman: On what occasion is this?

The Witness: This is on the—

Trial Examiner Scharnikow: 26th of April.

The Witness: 26th of April in the afternoon. I think it was around 2 o'clock, to my recollection.

Q. (By Mr. Silverman) Up to that point, Mr. Howe, had any request for a man for a Bull Line ship received by the union to your knowledge? A. That was on the—no.

Fred M. Howe, for Board, Cross

511

Q. April 26? A. No. No call from the Bull Line for any ship.

• • • • •

[330] Q. (By Mr. Silverman) Did you on the afternoon of April 26, 1948, during the course of a telephone conversation or phone conversations with Mr. Fowler have any knowledge at that time of any opening aboard any Bull Line ship? A. No, I did not.

Q. Did Mr. Fowler mention any specific Bull Line ship for [330] which he wished a clearance? A. He did not.

512

Q. Did you at any time prior to the 27th of April, 1948, have any knowledge of an opening for the radio officer aboard a Bull Line ship? A. I was apprised of that after I arrived at the office, which was probably around noon.

Mr. Geltman: On what day?

The Witness: On the 27th.

Q. (By Mr. Silverman) Does the time of the assignment of Frank Paese, which refers to 10:30 a.m., does that refer to the hour when the call came in for the man or does that refer to the hour of the assignment? A. The hour of the assignment. The call must have come in before that time. Otherwise we could not give out this job.

513

Q. Now, did Mr. Fowler ever appear at the office of the union after this telephone conversation that you had with him on the afternoon of April 26th? A. No.

[334] Q. Is it a fact that during the course of the conversation with Mr. Fowler in your office after he had received the telegram which is now General Counsel's Exhibit No. 4, that you made some statement to Mr. Fowler to the effect that there were other jobs available for him at that time which you urged him to take in lieu

514

Fred M. Howe, for Board, Cross

of the trip he had made from Miami? A. You are going back to the February date now?

Q. Yes, back to the February date. A. Speaking of the telegram I sent Fowler?

515

Q. Yes. After he came in to speak to you about the telegram; during the course of that conversation did you say anything to him about other jobs being available then that he could have? A. I think my testimony was to the effect that I told him that he could have a job almost any time, almost any minute or hour of the day. Jobs were plentiful. He could take his choice. He was practically number one, number one on the list.

* * * * *

[342] Trial Examiner Scharnikow: Are you prepared to say—of course Mr. Howe has already testified and he has not testified as to the union's taking any action to suspend the membership of Mr. Fowler except on this date, February 27, 1948.

516

Mr. Silverman: We say that no other claim or bad standing is germane to the issues as we understand them here and under the facts as we know them to have been or as we claim them to have been.

Trial Examiner Scharnikow: Then I take it that for the purposes of this case Mr. Fowler was in good standing at all times between February 1, 1948 and April 26, 1948 except for this period—this short period of hours on February 27, 1948; is that right?

Mr. Silverman: That's right.

* * * * *

Fred M. Howe, for Respondent, Direct

517

[347] FRED M. HOWE (Respondent's Witness)

* * * * *

Direct Examination:

Q. (By Mr. Silverman) Mr. Howe, during the month of February, 1948, when for the first time did you have any communication either oral or written with Mr. Fowler? A. February, 1948.

[348] Q. I am referring to the incident aboard the Steamship Frances. A. To my recollection, it was Mr. Fowler's telephone call in reply to my telegram.

518

Q. So that the telegram was the first communication from you to Mr. Fowler during that incident; is that right? A. As near as I can recall; yes.

Q. I believe you have already testified that that telegram was sent while Mr. Kozel was in your office and as a result of these complaints that had been made by Mr. Kozel to you concerning his discharge or attempted discharge from the Steamship Frances? A. Yes, sir.

* * * * *

[360] Q. (By Mr. Silverman) At any time during the existence of the agreement, Respondent's Exhibit 2, which would carry us from during the period of 1947 and 1948, did the union grant its clearances by any means other than the physical delivery of a clearance to a man who appeared at the Union Hall for the purpose of obtaining such a clearance?

519

* * * * *

The Witness: I think that we did in one or two occasions, we mailed a clearance to the man in another port. I think about it—I think we did that here the other day to a man who lives in the State

Fred M. Howe, for Respondent, Direct

of Virginia, not too far from Norfolk; [361] and he wrote me and asked me if he had to come to New York to obtain the clearance. Naturally we told him that was not necessary. He could take the ship in Norfolk. However, we treat the outlying ports where we maintain no office much differently because we have to, than we do here in New York.

Q. (By Mr. Silverman) So far as the practice here in New York, what is the practice with respect to that, as far as obtaining clearances?

* * * * *

Do you know the question now, Mr. Witness?

The Witness: What is the practice in New York on the issuance of clearances?

They all come to the union office in New York.

Trial Examiner Scharnikow: But you do on occasion telephone a man who does not happen to be in the office when you get a call?

The Witness: But he will come to the office to get the clearance.

[362] Trial Examiner Scharnikow: But he will come to the office to get the clearance?

The Witness: That is right.

* * * * *

Q. (By Mr. Silverman) Any member who leaves a ship thereupon has a certain shipping date; is that correct?

A. That is correct.

Q. Which corresponds with the date on which he leaves a ship? A. That's right.

Q. That man may or may not be interested in shipping again immediately, isn't that so? A. That's right.

Q. And any time that man signifies a desire to ship out again, he has the right to ship out again, predicated upon his last shipping date; is that right? A. That's right.

Q. A man who is not in the New York area and who has reached [363] the point where he desires to ship out will customarily communicate with the union for the purpose of finding out approximately when he could ship out; isn't that so? A. That is correct.

Q. If a member asks you to notify him approximately when he can obtain an assignment, you will notify him when he is approaching that point; isn't that so? A. That is so.

Q. And upon notification of the fact he would be able to obtain an assignment, that man will normally come to New York for the purpose of obtaining such an assignment? A. That is right.

Q. Is that correct? A. That is correct.

Q. Once men reach the stage where they are approximately eligible, based upon their shipping dates, for an assignment, they customarily come to the Union Hall; is that correct? A. With certain exceptions. The exceptions are those that seem to take a great delight in having their names appear at the top of the list for a long time. It gives them a certain advantage. They know they can take any ship, and they do not come in immediately when their names are at the top of the list.

Q. But when, as and if, they elect to come in, they are at the top of the list and they are entitled to first preference on any job that may be available at that time. [364] A. They present themselves as little kings, and they can come in and take the job at any time they wish; and they do so.

Q. Was it under that very practice that Mr. Fowler

526

Fred M. Howe, for Respondent, Direct

was the top man on the list on April 26, 1948? A. Yes, that was the same practice.

Q. Now if an opening for a job is reported to the union or a request for a man is made to the union, do I understand correctly that that opening is then announced at the offices of the union and is made available to whomever wishes to bid on that job, preference being given to the man longest out of work?

.

527

The Witness: The practice is as follows: At ten-thirty in the morning and at two-thirty in the afternoon we announce to our men, all men present in the hall, the jobs that we have available that must be filled at that particular time.

Trial Examiner: Meaning that day?

The Witness: Meaning that day or possibly the next day.

Should any job come in prior to 10:30 or between 10:30 and 2:30 p.m., which is classified by us as a pierhead jump, which means they must have a man in a rush, then we go out in the hall at any time during the day and endeavor to induce [365] a man to accept one of these assignments. That is the practice.

528

.

[366] Q. (By Mr. Silverman) Now, Mr. Howe, if the union were notified of a job available and if at that particular time any individual member of the union had an older shipping date, for example, than men seated in the hall, would the men in the hall still have the right to bid on that job despite the fact there might be members on the roll with older shipping dates? A. We give out the

Fred M. Howe, for Respondent, Direct

529

job to those in the hall at the time unless there is a shortage of men, and we are obliged to use the telephone to outside cities and states to get men.

* * * * *

Trial Examiner Scharnikow: What about a call for a man, not a particular man but for a man to fill the job where the job is to be filled, say, a week after the request is made?

The Witness: We hold the job in that case until a day or two days before the man is to take the job. If the company wanted the man on a Monday morning, we might decide to fill the job on the previous Friday. Not—

530

Trial Examiner Scharnikow: Assume you have a request for [367] a man on a Monday, the job to be filled on the following Monday: What do you do in that case?

The Witness: Withhold the job until Friday.

Trial Examiner Scharnikow: Would you do anything about it at all?

The Witness: No. Just leave it on the desk.

Trial Examiner Scharnikow: Would you tell any of the men seated in the hall in that week before Friday?

531

The Witness: Well, we might tell the men, "Well, we will have a job coming up next Monday morning. Any of you men wanting to go to China, there will be a ship going to China." But we will not give the job out until Friday or Saturday. We usually announce that then.

Trial Examiner Scharnikow: Would you make any attempt to notify the men at the top of the list?

532

Fred M. Howe, for Respondent, Direct

The Witness: If I can know—

Trial Examiner Scharnikow: Would you make any attempt from the time on Monday when the request by the steamship company is made until Friday to notify men at the top of the list who do not come in and sit in your hall during that week?

533

The Witness: No. Unless the only exception to that would be if we knew a certain individual wanted to go to China and this job was going to China, we might call him on the telephone, if we had the time, and thought of it, or send him a telegram, something, a letter telling him it might be [368] advisable for him to come in at a certain time, certain date because we are going to give out a job on a ship going to China and if he has the right number he could bid on it. We might notify them.

* * * * *

534

[371] Q. So that the method by which the man signifies his desire to ship out is by appearing and asking for a particular clearance or by bidding on a particular job in the union hall, isn't that so? A. By bidding on the jobs.

Q. Now, is it also true that every man who bids on a job that is announced in the hall is by that action asking you for a clearance, assuming he is the successful bidder?

A. Yes. It is assumed he will get one if he bids on the job.

Q. And if because of priority in shipping date one man is [372] given the clearance for the job, by the same token that clearance is denied to every other man? A. That is correct.

Q. In February, 1948, when Mr. Miller was assigned to the Steamship Frances, was there any reason having any-

Fred M. Howe, for Respondent, Direct

535

thing to do with union activities or lack of union activities or any other consideration that caused you to show any preference in favor of Mr. Miller as against Mr. Fowler when that assignment was made? A. I distinctly recall the day we gave that job out. There was quite a crowd in the room. I would judge there was 20 or 25 men, and very few men bid on the job. And Mr. Miller was given the assignment solely because he had the oldest shipping date of those who wanted the job. There may have been others there that had an older shipping date, but they did not want the job, they did not bid for it; therefore Mr. Miller was given the clearance.

536

Q. In April, 1948, when Paese was assigned to the Steamship Evelyn, was there any reason for assigning Paese in preference, for example, to Mr. Fowler or any other member?

• • • • •

[374] Trial Examiner Scharnikow: What was Paese's last shipping date, if you have a knowledge?

The Witness: Before he took the Evelyn?

Trial Examiner Scharnikow: That is right.

• • • • •

537

The Witness: Yes, sir. Paese's shipping date at that time was March 19, 1948.

• • • • •

[376] Q. (By Mr. Silverman) Has your office of the union ever during the period 1948 issued a clearance to a man before it has received notification from a company that a man is desired aboard the vessel of that company? A. No.

• • • • •

538

Fred M. Howe, for Respondent, Cross

[381] Q. Will you refer to your records, please, Mr. Howe, and tell us who the operator was aboard the Evelyn during the month of April, 1948 and what the date of his departure from the ship was? A. The man's name was Vanzandt Stone. He left the Evelyn at Philadelphia on April 27, 1948.

Q. April 27, 1948? A. That is correct.

539

Q. Had you received any word from Mr. Stone or from Mr. Frey or from Mr. Fowler at any time before April 27, 1948 of any vacancy aboard the Evelyn? A. No, sir. None at all.

* * * * *

Cross Examination:

Q. (By Mr. Geltman) Mr. Howe, let's go back to that February incident. You said the first time you knew there was anything to complain of was when Kozell came in and complained.

When was that? [382] You mean the exact date?

540

Q. Well, in point of time; you know when you sent the telegram because we have the telegram, General Counsel's Exhibit No. 4. A. You don't want the exact date. Just in general?

Q. How long before you sent the telegram did you first see Kozell and hear the complaint? A. That was the second visit he was there.

Q. You mean when you sent the telegram?

* * * * *

[383] Q. So when you sent out the telegram it was with knowledge from Kozell that Kozell had been discharged?

[384] A. That he had not separated himself from the ship; he was still aboard the ship; he was to be discharged.

Fred M. Howe, for Respondent, Cross

541

Q. That he was to be discharged or that he had been discharged? A. Well, you can get technical about it. He was to be discharged, that was definite.

Q. What was the background for that? What did he tell you? How did he arrive at this new situation? A. That the company had told him.

Q. Who had told him?

Trial Examiner Scharnikow: Did he say?

The Witness: I don't recall whether it was Mr. Frey or the captain or who it was now. He said the company was discharging him.

542

Q. (By Mr. Geltman) So he told you then he was going to be discharged, is that right? A. Yes, yes. He told me it was definite that he was to be dismissed from his job.

* * * * *

[386] Q. When Mr. Kozell came in and complained about the discharge, [387] didn't you take up with the company, yourself, of your own volition, the injustice that had been done? A. No, I did not call Mr. Frey then.

Q. I show you this letter, General Counsel's Exhibit 12 which you have acknowledged you wrote.

543

* * * * *

Q. (By Mr. Geltman) The last sentence there is, "We thereupon registered our protest with the company." A. I did. I sent Mr. Kiggins a telegram.

Q. What did you say in it? A. You have it here.

Trial Examiner Scharnikow: You sent whom a telegram?

The Witness: Mr. Kiggins.

* * * * *

544

Fred M. Howe, for Respondent, Cross

[388] Q. (By Mr. Geltman) Is this the telegram you sent?

Mr. Geltman: Will you mark this, please, Mr. Reporter?

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 16 for identification.)

545

The Witness: That is the telegram.

Mr. Geltman: I offer it in evidence.

Mr. Silverman: May I see it, please? No objection.

Trial Examiner Scharnikow: General Counsel's Exhibit No. 16 for identification is admitted in evidence.

(Whereupon, the document previously marked General Counsel's Exhibit No. 16 for identification was received in evidence.)

* * * * *

546

[389] Q. You knew, didn't you, when you spoke to Mr. Fowler, he [390] coming up from Miami—I am talking of the time he saw you after he received this telegram, General Counsel's Exhibit No. 4—that he came up from Miami specifically to take that job which had been offered him by the Bull Steamship Company, didn't you? A. I knew that only from what he told me.

Q. He told you that? A. He told me he had come up to get the job.

Q. That particular job? A. Yes, that is right. That particular job.

Q. You have told us that he left with you the impression

Fred M. Howe, for Respondent, Cross

547

he was going to go back, the job not having been received, is that it? A. He told me he was going back to Miami.

Q. But you knew that was the very job he wanted, it was that job because you offered him other jobs, didn't you?

A. Yes. I knew that was the only job he came up there for.

Q. Did Kozell tell you Mr. Fowler was staying on the ship? A. He said Fowler was on board. He had moved his things on board. I assumed he was staying.

Q. Now you issued the clearance to Miller, didn't you, to take the job on the Frances? A. I gave the job out that afternoon.

548

* * * * *

[391] Trial Examiner Scharnikow: Did you receive a request from the Bull Steamship Company to fill that job?

The Witness: Yes, sir.

[392] Trial Examiner Scharnikow: Did you, yourself?

The Witness: Yes.

Trial Examiner Scharnikow: How did it come to you?

The Witness: I was ordered to fill that job.

Trial Examiner Scharnikow: How did it come to you? How did this particular job come to you?

549

The Witness: I am trying to tell you I was ordered to fill that job either by Captain Williams or Mr. Kiggins, I do not recall which one of these men told me to go ahead and fill the job, because I talked to both that day.

Trial Examiner Scharnikow: What day?

The Witness: I think that was on Monday, wasn't it, or was it Tuesday? I forget the dates here.

* * * * *

550

Fred M. Howe, for Respondent, Cross

[393] Q. (By Mr. Geltman) Did you receive the call for the job on a Monday? A. I received the telephone call on a Monday.

.

551

[394] Mr. Silverman: Mr. Trial Examiner, I understand that at your request the Shipping Articles covering the Steamship Frances have been produced here and that counsel to the general counsel and myself are prepared to stipulate that the facts pertaining to the Shipping Articles as disclosed by the Articles are substantially as follows:

552

First, that the Shipping Articles actually signed pertaining to the Steamship Frances upon which Mr. Kozell's name appears were originally executed on November 26, 1947 and provided that the Steamship Frances which was then bound from the Port of New York, had its destination "one or more ports in Europe either direct or via one or more United States Atlantic and/or Gulf ports and such other ports and places in any part of the world as the master may direct and back to a final port of discharge in the continental United States for one voyage only or for a term of not exceeding nine calendar months."

It is my understanding that the effect that Articles in that form have is to make the Articles or the employment—and these articles are in effect a contract between the master and the members of the crew—to the effect that the employment [395] was for the period specified in these Articles, namely for one voyage as I have described it or for a period of nine months, whichever was the lesser of those two periods of time. In other words, if the voyage

Stipulation

553

should be in excess of nine months, the crew would have the right to be paid off at the termination of nine months should they so elect.

These Articles further disclose that as originally signed on or about November 26, 1947 Mr. Jay J. Lopez was the radio officer on that vessel, and his number on the shipping Articles was the number 16; and that the last signature appearing on these Articles is the signature of Alexander Kozell, radio; the date of Mr. Kozell's signing on was apparently December 22, 1947; that these Articles further show on a sheet which is entitled, "Particulars of Discharge or Receipt" that 48 men apparently who presumably comprised the entire crew of this vessel received their wages and signed off Articles by their signature on this sheet that I have just described on February 20, 1948, except that Lopez had apparently signed off on December 22, 1947; and that the last name appearing on this sheet containing "Particulars of discharge" is the signature of Alexander Kozell.

554

I understand likewise there is no objection to stipulating as to the following facts with respect to the signing of Ship's Articles and the signing off of Ship's Articles:

555

Namely that the act of signing off Ship's Articles [396-7-8] carries with it no implication whatsoever to the effect that the individual so signing off Ship's Articles is thereby permanently severing or terminating his employment with the particular vessel or the particular company, in that in actual practice a large or at least a very substantial portion of the members of the crew who sign off articles do in

556

Fred M. Howe, for Respondent, Cross

fact remain on the vessel or return to the vessel and thereafter they sign new articles for the subsequent voyage which in all likelihood would be in form similar to the Articles I previously described; that the date of signing off Articles does not necessarily carry with it an implication of termination of the individual so signing off the payroll of the company, but does, as I understand it, merely involve a switch over from a voyage payroll aboard the vessel while on active duty to what is known as the port payroll; that is the case of Mr. Kozell, he was carried on the port payroll until February 26, 1948.

557

Trial Examiner Scharnikow: Is that proposed stipulation agreeable?

Mr. Geltman: That stipulation is agreeable.

Trial Examiner Scharnikow: Very well.

* * * * *

558

[399] FRED M. HOWE resumed the stand and was examined and testified further as follows:

Cross Examination (Continued):

* * * * *

[414] Q. (By Mr. Geltman) Let's turn to the April incident. You have testified that on April 26 you had a telephone call from Fowler, isn't that right—April 26.

Let me refresh your recollection. A. That was after he had taken the Raphael Semmes.

Q. After the Raphael Semmes incident? A. That was the 26th, I believe. To check on the date—it was after he had rejected the Raphael Semmes, whatever date that was.

Q. The date of the Raphael Semmes incident? A. He called me on the telephone in the afternoon.

Q. Will you tell me please what happened in that conversation? A. You mean what was said?

Q. That's right. A. What I said and what he said?

Q. Yes. A. That is impossible. I can only tell the substance of it.

Q. Do. A. The substance of it was, he said he was refusing the Raphael Semmes. And I asked him why. His reply was, in substance, he didn't like the setup. I said what do you mean, you don't like the setup? [415] He said, well, he had come on board and he had talked to two or three fellows and he just didn't like the setup. And he—and I want to be assigned to a Bull Line ship.

560

And I says, "How are we going to assign you to a Bull Line ship if we do not have any?"

That was in substance what we discussed.

Q. Didn't you hang up on him on that occasion? A. I have no recollection of hanging up on him, no. I usually don't do that.

* * * * *

[416] Q. Isn't it true that from the time you saw Fowler in February right through to the time you spoke to Fowler on this occasion on April 26, you kept telling Fowler not to take a Bull Line ship, that you would not let him take it? A. I kept telling him?

561

Q. That's right. A. He was in Miami. How could I tell him? I wasn't in Miami.

Trial Examiner Scharnikow: The answer is you did not.

The Witness: I did not.

562

Fred M. Howe, for Respondent, Redirect
Joseph P. Glynn, for Respondent, Direct

Q. Well, he was at your office in February after you sent him the telegram dated February 27; that is right.
 [417] A. Yes.

Q. Was there any conversation at that time in the course of which you said, "You cannot get a Bull Line ship, I won't let you have one?"

• • • • •

563

The Witness: I may have told Mr. Fowler that he could not have a Bull Line ship unless I had one. I did not tell him he could not have a Bull Line ship.

• • • • •

[425] Redirect Examination:

Q. Do you ever assign that job, a job aboard that ship, or announce the existence of an opening aboard that ship until you have received a call from the company? A. We never assign a man to a ship like that; but sometimes I do tell the men that on a certain day in the future there will be a job that will be given out in this hall.

564

Q. In other words, that indicates to you the likelihood and [426] the prospect of a job? A. That is all it indicates.

• • • • •

[429] JOSEPH P. GLYNN (Respondent's Witness)

Direct Examination:

Q. (By Mr. Silverman) Mr. Glynn, what is your position with the Radio Officers' Union? A. I have been employed on a steady basis at the Radio Officers' Union since the latter part of January, 1948.

Joseph P. Glynn, for Respondent, Direct

565

My position there is that of Mr. Howe's assistant.

Q. Now, are you in charge of the office during the absence of Mr. Howe? A. That's right. I run the office while Mr. Howe is away.

* * * * *

[432] (By Mr. Silverman) Do you recall seeing Mr. Fowler at the office of the union during this February incident? [433] A. Yes. I can truthfully say that I recall seeing him there. I do not recall that I carried on any conversation with him.

566

Q. Do you recall any telephone call coming into the office of the union subsequent to the occasion of that visit in February by Mr. Fowler? A. No. I could not swear to that. The telephone rings every three or four minutes. If Mr. Howe picked it up, I would have no way of knowing who it was.

Q. Did you personally have any conversation with Mr. Fowler at that time? A. No.

Q. I would like now to take you to this April incident. When, for the first time, around April or the latter part of April did you see Mr. Fowler? A. On the morning of Monday, April 26, 1948, at approximately, I should say, anywhere between 9:15 and possibly 9:30 and 9:45 a. m.

567

Q. Mr. Fowler has given some testimony here about a visit that he paid to the office of the union on the Friday or Saturday prior to April 26, 1948.

Do you recall any such visit? A. I do not recall any such visit.

Q. Mr. Fowler has testified in connection with that alleged visit that during the course of that visit Mr. Howe called [434] you into his office and asked you to witness the ceremony of Mr. Howe offering Mr. Fowler a job.

Does that in any way refresh your recollection? A. No.

568

Joseph P. Glynn, for Respondent, Direct

Q. As to a visit by Mr. Fowler prior to April 26? A. No, it does not.

Q. When Mr. Fowler appeared at the office of the union on April 26, 1948, you at this moment have any recollection of having seen him within a matter of a day or two or three prior to that?

* * * * *

569

Q. (By Mr. Silverman) In other words, when he came in on April 26, 1948, to the best of your recollection was that the first time during that period when you had seen Mr. Fowler? A. That is correct.

Q. When Mr. Fowler came to the office of the union on April 26, will you tell us what happened? A. There wasn't—

Do you want me to give you the whole train of events which took place April 26 in the morning?

Q. Yes, I wish you would. [435] A. Mr. Fowler came in, as I have testified, approximately sometime maybe between 9:15, 9:30, 9:45, and there were other members in the hall at that time, too, possibly six, eight, ten, something like that.

570

And I should judge at approximately oh, 9:45, I received a call from Miss McCann, she is in the personnel office at the Waterman Steamship Company. She told me she wanted a man for the S. S. Raphael Semmes, and she would like to have him sent down that morning.

So I got all the information from her on the job that I could, where it was going and so on, where the ship was docked, and so on and so forth. And about 10 o'clock I went out into the outer from the inner office and gave that job out along with another job that had come in, a tanker; and I announced those two jobs to the men that were in

the hall at that time. And the men that were interested in either one of the two jobs could give their bids.

And after accepting all bids, I went back into the inner office to determine who was top man and who should get first crack at these jobs.

Mr. Fowler was the top man that wanted the S. S. Raphael Semmes, and I made out the clearance and the assignment slips for this job; and as I was doing so, Mr. Fowler asked me if it would be all right if he went down to look at the ship before he positively and flatly stated he was going to take it. [436] I said, "of course that will be all right, but just so you do not put us in a hole by waiting for the last minute, I want you to call us back."

572

So Mr. Fowler left the office which, I would say, might be ten or fifteen minutes later, which may be about 10:15 a. m.

And then about 10:20 a. m. the telephone rang; I picked up the receiver and said, "Hello." And the voice on the other end was that of Mr. Frey.

Mr. Frey said, "Say, have you seen Fowler around?" I am not positive whether he said "Around town" or "Around the hall" or "Around the office," but he said, "Have you seen him around?"

573

I said, "Why, yes, he was just here but he left a few minutes ago. I assigned him to a Waterman Line ship, Mr. Frey."

Mr. Frey said, "Oh, I see. Thank you very much." And the conversation ended. We both hung up.

Q. Did Mr. Frey during the course of that conversation say anything to you about the fact that he wanted Mr. Fowler for the S. S. Evelyn? A. He did not.

Q. Did he say anything to you to the effect he wanted a man for the S. S. Evelyn? A. He did not.

574

Joseph P. Glynn, for Respondent, Direct

Q. Did he indicate to you in any way there was an opening [437] aboard the S. S. Evelyn? A. No.

Q. Now, was Mr. Fowler in the office of the union at the time that Mr. Frey's telephone call came in? A. I have just testified Mr. Frey's telephone call came in anywhere from five to ten minutes after Mr. Fowler had left the office with his assignment to the Waterman Line ship.

Q. You apprised Mr. Frey of the fact Mr. Fowler had left the office with that assignment? A. That is correct.

575

Q. During the course of the day did you receive any further word personally from Mr. Frey or Mr. Fowler, do you recall? A. Not from Mr. Frey or Mr. Fowler, no.

Q. Did you at any time during the course of that day, as far as you can recall, receive any word of an opening for a man aboard the S. S. Evelyn? A. That is on April 26?

Q. That's right. A. No, I did not.

576

Q. When for the first time were you aware of any opening aboard the S. S. Evelyn? A. To my recollection the first time that I was aware of any opening on the S. S. Evelyn was in the morning of April 27. That would be a Tuesday. I cannot pin the time down exactly, but sometime between the time I opened the office at nine and [438] I will say 10 or 10:15, I received a call from the company asking for a man for the S. S. Evelyn.

Q. Do you have any recollection as to who it was that made that call? A. I cannot state absolutely who it was. It might have been Mr. Frey; may have been Captain Williams; may have been someone else.

Q. Will you tell us generally how the assignment or the granting of clearances to men functions in the office of the Radio Officers' Union? A. You are speaking I presume of February and April, 1948?

Q. That's right. A. As has already been testified, we have what you call a shipping list, and the members who are waiting for employment are on that list. Their position on that list is determined by what we call their shipping date.

In other words, the time they got off their last ship is their shipping date.

When we receive a call from a steamship company to the effect they want a radio officer to place on the S. S. Never-sink, the job is given out in connection with that beach list. In other words, we ask the men who are in the hall at that time that the job is given out, we ask them to put up their hands or to signify in some way they wish to bid on the job. [439] We take their names down and we determine who is the top man on the shipping list. That man gets first crack at the job. He is not coerced. He is not forced to take it. But if he wants to take it, that is his privilege. He has first crack.

578

Q. Do all men who are interested in shipping out signify their availability for employment by their presence at the hall at the union office? A. Well, if they want to get a job they should because the union does not feel it is the union's obligation to go hunting all over creation to route up a man. If he wants a job, he should make himself available in the hall.

579

Q. Were there occasions during the period we are discussing when a request would be made for a particular man who would be sought out by the union even though not present at the union office? A. Offhand, you are speaking of, I presume, January, February and March and April of 1948?

Q. That's right. A. I have no recollection of receiving

580

Joseph P. Glynn, for Respondent, Direct

any calls myself personally by any steamship company asking for any individual.

Q. What is the general nature of the call that is received by the union—during that period? A. The steamship companies call and they ask for a radio officer; and that is what we send them, a radio officer.

581

[440] Q. And the particular radio officer who is given clearance for the job is chosen or selected on the basis you have described, tied in with the shipping date? A. That is right. He is not chosen by myself or by Mr. Howe whether we dislike the man or like the man, that has no bearing at all. If he is top on the list and he wants the job, he gets it, provided he is satisfactory to the company.

Q. Are there any occasions when a company has called and said, "I want Mr. John Doe," and the union has thereupon telephoned or wired or sent an investigator out to find Mr. John Doe to see whether he is interested in shipping at that moment. A. In the months of January, February, March and April, 1948, I would say no, not to my recollection.

582

Q. When you qualify it by those months, are you thinking of conditions during the war when the union cooperated with companies in the direction of trying to seek men who might at that particular moment not be particularly interested in shipping but who were asked to ship as a matter of patriotic duty? A. I am speaking of mainly due to the fact I did not start working on a steady basis until the latter part of January, 1948, at the Radio Officers' Union office.

.

[449] Trial Examiner Scharnikow: Something else has occurred to me, gentlemen.

At several stages in the hearing, when Mr. Geltman started to go into questions dealing with the

Colloquy

583

possible [450] employment of Mr. Fowler, I made rulings based upon the propriety of postponing for the compliance stage, in the event an order is issued, any question of loss of earnings, the extent of loss of earnings.

.

[454] Trial Examiner Scharnikow: But the problem I have I don't want the record to be confused on. That is why I am butting in as I am at the present moment.

584

Are you submitting for my finding and recommendation to the Board on the record at the present stage of the proceeding the question of whether or not there was any failure on the part of Fowler to secure other employment, so that even if a [455] discrimination should be found by the Board and an order issued against the respondent union, no order for compensation should be a part thereof?

Mr. Geltman: No, I have not. That is to say, I have not shown affirmatively with respect to Fowler's presence in the labor market thereafter.

Trial Examiner Scharnikow: The reason I ask the question is this: It should be understood we are either trying that issue or we are not trying that issue. If we are trying that issue for submission on whatever evidence we have in this hearing, then I will make a recommendation in that respect. If we are not trying that issue, gentlemen, if you feel that although incidentally some pertinent evidence has come into the record, there may be other evidence you will eventually want to submit, assuming it will reach the compliance stage, then I will not make a recommendation.

585

Colloquy

586

Mr. Geltman: Under the circumstances, in view of what you have just outlined, I would be faced here with the burden of going forward with—let me say: In the usual compliance case the burden of determining whether removal from the labor market falls upon the respondent if there has been an order. I do not want to assume that burden here. Consequently I have not—

587

Trial Examiner Scharnikow: Are you assuming that burden, Mr. Silverman?

[456] Mr. Silverman: Mr. Trial Examiner, I think I should at this point make our position on this quite clear.

During the earlier stages of this hearing it was possible to delve into matters which would have had a bearing upon any possible question of compliance. I understood that some questioning along those lines was curtailed for the reason it fell into that category.

Trial Examiner Scharnikow: Let me say that is correct. That is my understanding.

588

Mr. Silverman: However, I do not think that the answer to the question you have just put or the questions you have just put to the counsel for the general counsel and to me need necessarily be answered uniformly with respect to the two possibilities.

May I expand on that for just one moment?

Trial Examiner Scharnikow: Surely.

Mr. Silverman: It is our contention that regardless of what decision may be rendered here, the proof adduced as part of a recital of all the facts and circumstances surrounding the alleged unfair

labor practice is such that from the words of the charging party himself as well as from other almost uncontroverted proof or uncontrovertible proof, that it clearly appears that in any event no back pay award would be warranted in this case under any circumstances.

Trial Examiner Scharnikow: Are you willing, in that [457] connection to foreclose yourself—

Mr. Silverman: No.

Trial Examiner Scharnikow: (Continuing)—
from the use of any other evidence in a possible compliance stage?

590

Mr. Silverman: No. That is why I say this is one situation where what is fish may not necessarily be fish.

Trial Examiner Scharnikow: That is the reason why I raise the question.

Mr. Silverman: I do say in my opinion, Mr. Trial Examiner, the record so clearly establishes that in any event no back pay award would be proper in this situation, that it would be entirely within the province of the Trial Examiner to so find on the basis of the record as it appears, on the basis of the record of the charging party himself.

591

Trial Examiner Scharnikow: In other words, I could make a finding there should be no back pay award?

Mr. Silverman: Yes.

Trial Examiner Scharnikow: But I cannot make an absolute finding there should be a back pay award?

Mr. Silverman: That is right.

To expand on that for a moment—

Colloquy

592

Trial Examiner Scharnikow: All right. I understand you. I am pretty sure I understand you.

The sum and substance is neither of you gentlemen is willing to depart from the normal rule that the question of the [458] extent of the possible back pay award shall be tried at this stage of this proceeding.

Mr. Geltman: Should not be tried.

593

Trial Examiner Scharnikow: Should not be tried. Therefore, in that posture I will say that since you do not expect me to make the recommendation and both of you reserve the right to introduce pertinent evidence or additional pertinent evidence, when, as and if it becomes necessary, I will not make a recommendation.

• • • • •

594

Trial Examiner Scharnikow: Let me repeat what I have said: On the basis of this discussion, I consider the question of [459] whether or not a back pay award should be cut down to the extent Mr. Fowler could have secured other employment not an issue in this hearing, and I will make no recommendations—this is a flat statement—I will make no recommendations in my report on that question.

The evidence that might be pertinent on that question has come in incidently and in spite of rulings where my attention has been called to that, excluding that type of evidence, excluding other points; and to make the position clear and your burden in this matter definite, I am now stating I will not make any recommendation but will observe the ordinary rule on the compliance question. That will not preclude your using, as I see it, any evidence in this case

Colloquy

595

at that stage in the compliance stage, and of course will not preclude your going into additional evidence.

Mr. Silverman: Mr. Trial Examiner, do you feel if you should find from the testimony adduced in this record that it is obvious and clear that a back pay award would be inappropriate in this case you would be precluded from so recommending?

Trial Examiner Scharnikow: I am not going to conjecture as to the possible arguments and the possible additional proof that Mr. Geltman might produce when he gives direct attention to that question, and I am now definitely stating that question is not in this hearing, and will not be considered in my report.

596

.

[463] Trial Examiner Scharnikow: Just one second. Do I have any dispute as to the appropriateness of a radio officer's unit consisting of those officers of the Bull Steamship Company or the fact that a majority of those officers in such a unit had designated the respondent union as their bargaining agent on the date of the extension of Respondent's Exhibit 2, which was in August, 1947? Have I any dispute of that?

597

Mr. Geltman: We do not contend that—I think we are in agreement that the Radio Officers' Union was the representative of the radio officers.

Trial Examiner Scharnikow: So that on that basis I may properly make a finding that such a unit is appropriate and that a majority of such members of the unit on the date I just mentioned had

598

Robert H. Frey, for Board, Redirect, Recross

designated the respondent union as their bargaining agent?

Mr. Geltman: No dispute as to that.

Mr. Silverman: No dispute as to that.

Trial Examiner Scharnikow: There is no dispute as to that.

.

[464] ROBERT H. FREY (Board Witness recalled)

599

.

Redirect Examination:

Q. (By Mr. Geltman) When you spoke to Mr. Glynn on the morning of April 26, did he tell you in words or in substance, "Mr. Fowler has left the office?" A. No, sir.

Mr. Geltman: That is all.

Recross Examination:

Q. (By Mr. Silverman) What did he say about Mr. Fowler, Mr. Frey? A. When I called up, I asked him was Mr. Fowler in the union office and whether or not, if he was not, whether he knew where he could get hold of him because I had a job on the Evelyn for him.

600

Q. Did you say that all in one breath, Mr. Frey? A. The same as I did just now, yes.

Q. When you said to him, "Is Mr. Fowler in the office," did Mr. Glynn make any answer at that point or did you continue with your questioning or "do you know whether or not you can get hold of him," or did he interrupt at that point? A. He interrupted at the point where, "Is Mr. Fowler in the office," and I said, "Do you know where you can get hold of [465] him?" That is the trend of the conversation.

Robert H. Frey, for Board, Recross

601

Q. The first question you put to him was, "Is Mr. Fowler in the office?" and he did answer "No" to that, is that right? A. That's right.

Q. And your next question was, "Do you know where you can get hold of him?" Did he answer that question? A. I said, "Do you know where to get hold of him because I have a position on the Evelyn in Philadelphia for him."

Q. What did he answer to that question? A. He said he would see, and that is where it was left.

* * * * *

602

[466] Q. Who was the radio officer aboard the Evelyn immediately prior to April 2? A. Prior to Paese, you mean, or at the time that I called up for Fowler?

Q. At the time you called on the morning of April 26, 1948, who was the officer aboard the Evelyn? A. The radio officer at that time was Vanzandt Stone.

Q. And did Mr. Stone quit the job? A. Yes, he did.

[467] Q. When did he quit the job? A. He quit the job in Philadelphia on, I think it was the 26th when she arrived there. I believe she arrived on the 26th.

Q. Would your records show— A. From Baltimore.

603

Q. Would your records show the last date on which Mr. Vanzandt Stone was on the payroll of the Bull Line?

* * * * *

The Witness: Our personnel records indicate he got off on the 27th of April.

Q. (By Mr. Silverman) How did you know on the 26th of April Mr. Stone was not going to remain aboard the Evelyn? A. I was advised by our Baltimore office when the ship arrived in Philadelphia he was getting off the ship and they would need a new man. That was on Saturday, the 24th of April.

604

Robert H. Frey, for Board, Recross

Q. That was before the ship docked? A. That was before the ship arrived in Philadelphia from Baltimore.

Q. Is it not a fact, Mr. Frey, that as a general rule when a job opening occurs in the Port of Philadelphia that the Baltimore office of the Radio Officers' Union is requested [468] to assign a man? A. No.

605

Q. That is not the fact? A. That is not the fact and it is not generally followed. I consider Philadelphia under as much, we will say, the jurisdiction of the union office in New York to assign a man as well as the Baltimore office.

Q. Was there any reason why you did not call the office of the union on April 24? A. Yes. It was late in the afternoon and I did not have any reason to call them then and Monday morning was plenty of time to call.

Q. When had you first heard Fowler was in town? A. I imagine it was around the 22nd or 23rd of April.

* * * * *

[470] Q. (By Mr. Silverman) Did you ever, after the morning of April 26 again call the union—

* * * * *

606

Q. (By Mr. Silverman) (Continuing) —to request—

* * * * *

Q. (By Mr. Silverman) (Continuing) —a man for the Evelyn?

* * * * *

[471] The Witness: Mr. Howe and I had a conversation in the afternoon of April 26 sometime after noontime and at that time he stated to me that he would not clear Fowler for the Evelyn or any other Bull Line Ship.

* * * * *

General Counsel's Exhibit 2

607

(Letterhead of A. H. Bull & Co., New York)

March 21, 1950

Oscar Geltman, Attorney
National Labor Relations Board
2 Park Avenue
New York City

Re: Radio Officers Union
Case 2-CB91

Dear Sir:

603

At your request, I am supplying the following information concerning A. H. Bull Steamship Company, 115 Broad Street, New York City. The facts set forth below I know of my own knowledge because of my familiarity with the operations of the Company.

The above named concern was incorporated in New Jersey in 1902. It is now and was during the years 1948 and 1949, engaged in operating its own ships and ships chartered by it, between states of the United States and between the United States and foreign countries.

During the year 1948, the corporation operated an average of approximately 30 vessels; and during the year 1949, the corporation operated an average of approximately 23 vessels. In the course of each of said years, the corporation transported, by the ships described above, ~~articles and commodities~~ between the states of the United States and between the United States and foreign countries, articles and commodities of a value, in each of said years, in excess of five million dollars.

609

Yours very truly,

A. H. BULL STEAMSHIP CO.

(Signed) W A KIGGINS JR.
W. A. Kiggins, Jr.

610

General Counsel's Exhibit 3

(WESTERN UNION TELEGRAM)

DUPLICATE OF TELEPHONED TELEGRAM

ND48 PD=AX NEWYORK NY 24 402P

1948 FEB 24 PM 4 32

WILLARD FOWLER=

68 SOUTHWEST 8 ST MIAMI=

611

PROCEED NEW YORK AS SOON AS POSSIBLE FOR
POSITION SS FRANCES=

A H BULL AND CO AGENTS.

612

General Counsel's Exhibit 4

(WESTERN UNION TELEGRAM)

N195 DL PD 3 EXTRA=SI NEWYORK NY 27 251P

WILLARD C FOWLER RADIO OFFICER, STEAM-
SHIP FRANCIS=
PIER 22=

1948 FEB 27 PM 2 57

-614

YOU ARE HEREBY SUSPENDED FROM MEMBER-
SHIP IN THE RADIO OFFICERS UNION ON
GROUNDS THAT YOU NEGLECTED TO OBTAIN
CLEARANCE FOR YOUR PRESENT JOB AND ALSO
FOR BEING A PARTY TO DEPRIVING ANOTHER
MEMBER OF HIS JOB STOP LOCAL OFFICE OF
SEAFARERS INTERNATIONAL UNION AND HARRY
LUNDEBERG BEING NOTIFIED OF THIS ACTION
YOU MAY BE REINSTATED TO MEMBERSHIP BY
COMPLYING WITH RULES OF THIS UNION=

FRED M HOWE GENERAL SECRETARY
TREASURER RADIO OFFICERS UNION.

615

616

General Counsel's Exhibit 5

No. 12

The
COMMERCIAL TELEGRAPHERS' UNION

[Emblem]

January 6, 1948

Received from WILLARD C. FOWLER

..... TWELVE & 00/100 Dollars

Account of Dues 1st Qtr. 1948

617

\$12.00

(Signed) FRED M. HOWE
MM

Secretary-Treasurer

618

General Counsel's Exhibit 6

(Letterhead of The Radio Officers' Union, New York)

March 25, 1948.

Mr. Willard C. Fowler,
68 S. W. 8th Street,
Miami, Fla.

Dear Brother Fowler:

Enclosed you will find a receipt and a membership card covering the \$12.00 which we received from you in today's mail. This pays your dues at the full active rate through the second quarter of 1948. Many thanks for your remittance. It is highly appreciated.

Your name is on the waiting list here for jobs and we shall be pleased to offer you the best we have. I am sure you will enjoy and benefit by a change of companies. Your name will be sufficiently high on the list so that you can obtain a good assignment without waiting for more than a day or two, and this only so you may select the type of ship you desire.

With best wishes and kindest personal regards, I remain,

Sincerely and fraternally yours,

(Signed) FRED M. HOWE
General Secretary-treasurer

622

General Counsel's Exhibit 7-A

CERT.

NO. 1104 MARINE DIVISION

This card is not transferable. It must be signed in ink by the person to whom it is issued, who is entitled to fraternal courtesies. Expired cards should not be honored. This card is good only when countersigned by the international secretary-treasurer, and expires June 30, 1948.

ADDRESS

SIGNED

Countersigned:

RICHARD D. HALLETT

INTERNATIONAL SECRETARY-TREASURER

AFFILIATED WITH AMERICAN FEDERATION OF LABOR

TRADES AND LABOR CONGRESS OF CANADA

THE COMMERCIAL TELEGRAPHERS' UNION

624

ISSUED TO

WILLARD C. FOWLER

CONTINUOUS

GOOD UNTIL

MEMBER SINCE

June 30, 1948**July 1, 1942**

[Emblem]

UNLESS REVOKED

W. L. ALLEN

INTERNATIONAL PRESIDENT

RICHARD D. HALLETT

INTERNATIONAL SECY.-TREASURER

General Counsel's Exhibit 7-B

No.....32.....

THE COMMERCIAL TELEGRAPHERS' UNION

[Emblem]

March 25, 1948

Received from WILLARD C. FOWLER

***** TWELVE & 00/100 ***** Dollars

626

Account of Dues 2nd Qtr. 1948

\$12.00

(Signed) FRED M. HOWE

MM

SECRETARY-TREASURER

627

628

General Counsel's Exhibit 14

* * * * *

ARTICLE 7—GENERAL CHAIRMAN

* * * * *

629

Sec. 3 The General Chairman shall, with the consent of the General Committee, suspend immediately any officer or member of the ROU, whose activities are such that the reputation and best interests of the ROU are endangered, but such suspension shall not deprive the officer or member of his rights as a member. The basis of such suspension shall, within thirty days, be prepared in the form of charges and served on the accused in the form and manner set forth in Article 23, Sections 1 and 2 of the CTU Constitution, and the General Committee shall hear such charges as provided in Article 9, Section 4 of these by-laws.

* * * * *

630

Sec. 7 The General Secretary-Treasurer shall act as General Chairman in all absences of the General Chairman.

* * * * *

ARTICLE 17—RESPONSIBILITY

Sec. 1 Any member violating the by-laws of the ROU, the CTU Constitution, the contracts and agreements held by the ROU, and in any way contributing to the lessening of respect for the laws, rules, contracts,

and agreements of the ROU, and the good name of the ROU, shall first be advised by the Officer of the ROU first having knowledge of the foregoing to correct his dereliction, and if such is persisted in and not abated, the member shall be immediately suspended by the General Chairman and have charges against him as provided in Article 7, Section 3 of these by-laws.

• • • • •

634

General Counsel's Exhibit 16

(WESTERN UNION TELEGRAM)

WU K31 DL PD 3 EXTRA=SI NEWYORK NY 27 231P
 .319P.

A H BULL CO=
 VICE PRESIDENT
 W A KIGGINS.

635

THIS IS TO INFORM YOU THAT WILLARD C. FOW-
 LER IS NOT IN GOOD STANDING IN THIS ORGANI-
 ZATION ON GROUNDS THAT FORCING ANOTHER
 MEMBER OUT OF EMPLOYMENT IS STRICTLY
 AGAINST UNION BY LAWS STOP I AGAIN QUOTE
 PROVISIONS OF OUR AGREEMENT REQUIRING A
 CLEARANCE FOR ALL SUCH JOB. SEAFARERS
 INTERNATIONAL UNION LOCAL OFFICE AND
 HARRY LUNDEBERG BEING NOTIFIED=

=FRED M HOWE

GENERAL SECRETARY TREASURER RADIO OFFI-
 CERS UNION.

636

Respondent's Exhibit 2

637

THE RADIO OFFICERS' UNION

C. T. U.—A. F. of L.

1947

STANDARD DRY CARGO AND

638

PASSENGER SHIP

AGREEMENT

639

THE RADIO OFFICERS' UNION

1440 BROADWAY

NEW YORK, N. Y.

640

Respondent's Exhibit 2

* * * * *

Companies to which Standard Agreement applies:

UNITED STATES LINES COMPANY
AMERICAN SOUTH AFRICAN LINE, INC.
A. H. BULL STEAMSHIP CO.
SEAS SHIPPING COMPANY, INC.
SMITH AND JOHNSON
SOUTH ATLANTIC STEAMSHIP LINE

641

AGWILINES, INC.
THE NEW YORK & PORTO RICO STEAMSHIP CO.
MISSISSIPPI SHIPPING COMPANY
EASTERN STEAMSHIP LINES, INC.
BLOOMFIELD STEAMSHIP COMPANY
FALL RIVER NAVIGATION CO.
ISTHMIAN STEAMSHIP COMPANY
WATERMAN STEAMSHIP CORPORATION
BALTIMORE INSULAR LINE
SEATRAN LINES, INC.

642

AMERICAN LIBERTY STEAMSHIP CORPORATION
PENINSULAR & OCCIDENTAL STEAMSHIP CO.
NEW YORK AND CUBA MAIL STEAMSHIP CO.
AMERICAN EASTERN CORPORATION
ALCOA STEAMSHIP COMPANY, INC.
NEWTEX STEAMSHIP CORPORATION
WILLIAM J. ROUNTREE CO., INC.
MERCHANTS & MINERS TRANSPORTATION CO.

* * * * *

WITNESSETH:

Article I—Employment

SECTION 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies.

• • • • •

644

SECTION 3. When a member of the Union in good standing qualified to fill the vacancy is not available the Company will notify the Union twenty-four (24) hours in advance before a non-member of the Union is hired, and give the Union an opportunity to furnish without causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

• • • • •

645

SECTION 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio

646

Respondent's Exhibit 2

Officer has been assigned. If a member is not in good standing the Union will so notify the Company in writing.

• • • • •

Dated this 11th day of January, 1947.

By.....

647

Attest:

RADIO OFFICERS' UNION OF THE
COMMERCIAL TELEGRAPHERS' UNION

By FRED M. HOWE
General Secretary-Treasurer

Attest:

• • • • •

648

Respondent's Exhibit 3

The Radio Officers' Union
C. T. U. — A. F. of L.
Room 1568
1440 Broadway
New York, N. Y.

MEMORANDUM OF AGREEMENT

It is hereby mutually agreed this 16th day of August, 1947, by and between the Radio Officers' Union of the Commercial Telegraphers' Union and A. H. BULL STEAMSHIP COMPANY/BALTIMORE INSULAR LINE that the collective bargaining agreement dated January 11, 1947, as amended, be extended to August 15, 1948, and that Section 4, Article 23 be changed to read as follows:

650

The parties hereto enter into this Agreement for a period to and including August 15, 1948. The parties hereto also agree that sixty (60) days prior to the expiration of this agreement negotiations will be entered into for the purpose of reaching a satisfactory new agreement.

651

The terms and provisions of this Agreement shall not become effective on vessels operated for the account of the Maritime Commission until all the terms

652

Respondent's Exhibit 3

and provisions hereof shall have been authorized by
the Maritime Commission.

Dated this 16th day of August, 1947.

RADIO OFFICERS' UNION of the
COMMERCIAL TELEGRAPHERS' UNION

By: (Signed) FRED M. HOWE
General Secretary-Treasurer

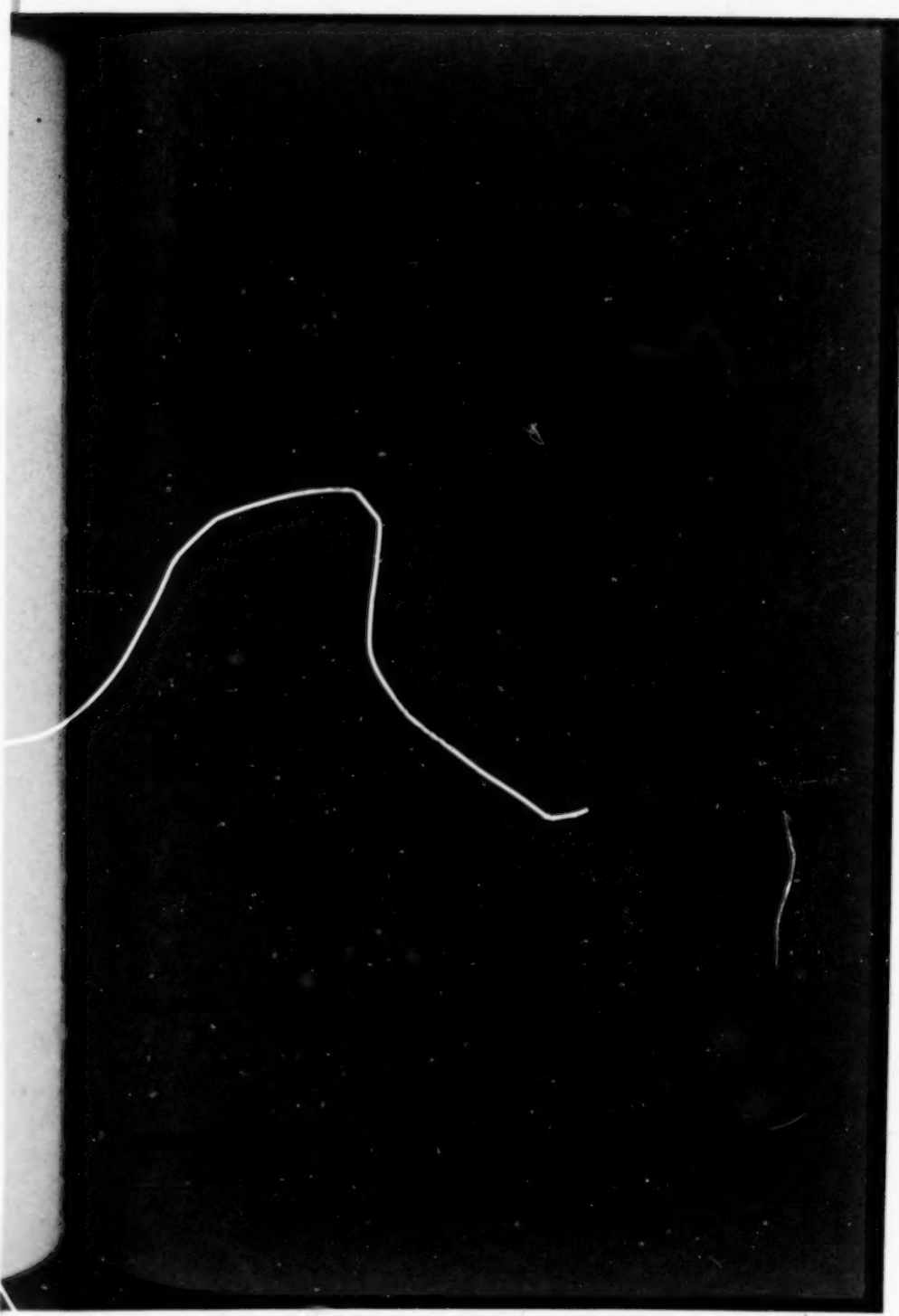
653

A. H. BULL STEAMSHIP COMPANY
BALTIMORE INSULAR LINE

By: (Signed) W A KIGGINS JR

654

BLURRED COPY



INDEX

	PAGE
Excerpts from Testimony	1
Motion to Strike Out Testimony	41
Motion to Dismiss Complaint	42
Argument on Behalf of General Counsel	61
Argument on Behalf of the Respondent Union	62

TESTIMONY

Willard C. Fowler,	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">Direct</td> <td style="text-align: right;">1</td> </tr> <tr> <td>Cross</td> <td style="text-align: right;">10</td> </tr> <tr> <td>Re-direct</td> <td style="text-align: right;">29</td> </tr> <tr> <td>Re-cross</td> <td style="text-align: right;">29</td> </tr> </table>	Direct	1	Cross	10	Re-direct	29	Re-cross	29
Direct	1								
Cross	10								
Re-direct	29								
Re-cross	29								
Robert H. Frey,	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">Direct</td> <td style="text-align: right;">29</td> </tr> <tr> <td>Cross</td> <td style="text-align: right;">29</td> </tr> <tr> <td>Re-cross</td> <td style="text-align: right;">60</td> </tr> <tr> <td>Re-direct</td> <td style="text-align: right;">60</td> </tr> </table>	Direct	29	Cross	29	Re-cross	60	Re-direct	60
Direct	29								
Cross	29								
Re-cross	60								
Re-direct	60								
Fred M. Howe,	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">Direct</td> <td style="text-align: right;">33, 43</td> </tr> <tr> <td>Cross</td> <td style="text-align: right;">35, 50</td> </tr> <tr> <td>Re-direct</td> <td style="text-align: right;">51</td> </tr> </table>	Direct	33, 43	Cross	35, 50	Re-direct	51		
Direct	33, 43								
Cross	35, 50								
Re-direct	51								
Joseph P. Glynn,	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">Direct</td> <td style="text-align: right;">53</td> </tr> <tr> <td>Re-direct</td> <td style="text-align: right;">54</td> </tr> </table>	Direct	53	Re-direct	54				
Direct	53								
Re-direct	54								

EXHIBITS

	PAGE
General Counsel's Exhibit 8	64
General Counsel's Exhibit 10	64
General Counsel's Exhibit 11	65
General Counsel's Exhibit 12	67
General Counsel's Exhibit 14	70
Respondent's Exhibit 2	72
Respondent's Exhibit 5	75
Respondent's Exhibit 6	75
Respondent's Exhibit 7	76
Respondent's Exhibit 8	77
Proceedings in U.S.C.A. for the Second Circuit	78
Opinion, Swan, J.	78
Dissenting opinion, Clark, J.	86
Decree enforcing an order of the National Labor Re- lations Board	90
Appendix A—Form of notice pursuant to decree, etc.	92
Clerk's certificate	(omitted in printing) 93
Order staying judgment	94
Order allowing certiorari	98

WILLARD C. FOWLER, Direct.

[5] Mr. Silverman: I merely wish to indicate by proceeding at this time I do not want to appear to indicate my readiness to proceed in the event this motion is entertained today or granted today, because this motion to amend which will be shortly before you, Mr. Trial Examiner, is of such a substantive nature it will be necessary to apply for an adjournment in this matter.

I have no objection to the procedure by Mr. Geltman but I do not want my participation in the proceedings at this time to be construed as acquiescent in this proceeding today.

* * * * *

[6] Mr. Silverman: My objection is to the notice of motion offered as General Counsel's Exhibit 1-H, solely as to that [7] paper.

* * * * *

Mr. Geltman: The reason why this motion is made at this time is because, as counsel for the General Counsel, I was not in possession of [8] facts which made it appear to be that a violation had occurred as charged—may I interpolate, both events were charged in the charge filed herein—I was not in possession of facts making it appear a violation had occurred on the earlier occasion until I personally interviewed the charging party for the first time on the evening of last Wednesday, this being Monday.

Up to that time all of the communications concerning this case had been either by letter or by a few telephone calls, the charging party residing in Miami, Florida, and it was impracticable for him to come up or for me to go down in order to properly prepare. I did the best I could with the material I had available, and I just did not know until I saw him that the facts added up to a violation.

* * * * *

Willard C. Fowler—Direct.

[9] Mr. Silverman: Counsel for the General Counsel has given you some of the background. I think, therefore, these additional facts should be borne in mind:

Firstly, this notice of motion was served on us on Friday at approximately 2:45 p. m., and by the amendment it is sought to add to the complaint a charge of an alleged unfair labor practice occurring on a different date than that originally contained in the complaint.

The charge as originally served charged unfair labor practices on both approximately February 27, 1948 and approximately April 26, 1948. Both of those charges were originally dismissed by the Regional Director of this Region. They were thereafter reinstated by the General Counsel; and after that reinstatement and with full knowledge of the facts the original charge had included both dates, the February date and the April date, the Board here, upon the basis of the examination and investigation originally and as well as its investigation subsequent to the action of the General Counsel, saw fit to limit the complaint issued in this matter to the incident occurring on April 26, 1948.

Now, that history is highly significant to my mind. The [10] granting of the amendment at the present time would, in effect, constitute the issuance of a new complaint because the incident—the date—is unrelated; the affect of the amendment would be to require us to defend two cases instead of one. The fact that the named are the same does not alter that fact.

And investigation and the preparation which would be required on our part to defend ourselves against the charge of an unfair labor practice having occurred in February would be expensive. And so, it is our position that this request to amend the complaint at this late date should be denied, in which event we are prepared to proceed; or, if it be granted, that a suitable adjournment be

Willard C. Fowler—Direct.

granted to the union to enable us to properly defend ourselves and interpose such answer as we may wish to any amended complaint and prepare to meet it.

* * * * *

[12] Mr. Geltman: That is right. I intend to show that the granting of a clearance was the union's assent to the employment of a man; the denial of a clearance was the union's denial of the company's right to employ the man.

* * * * *

[15] Trial Examiner Scharnikow: Would it be your position in the course of your defense to assert that the contract language which you would thus urge as a defense is clear on its face?

Mr. Silverman: No, I do not. I will not go so far as to say it is clear on its face. I believe it will have to be supplemented by actual presentation of actual practice and in [16] interpretation given to that clause by the parties to the agreement.

* * * * *

[18] Mr. Geltman: I think it is Mr. Silverman's position—I don't know whether I am right or not—I think he is under [19] the impression that with respect to the first incident not originally alleged, we claim that despite the fact that a job was then filled which the charging party sought to take, the union was wrong in depriving the charging party of that job.

We make no such claim.

Our position is that the job was empty. Now I say this because we have had some off-the-record discussion during which—

* * * * *

Mr. Silverman took the position that a different rule would apply with a job filled.

I agree it may well do so; but that is not our view.

Willard C. Fowler—Direct.

Our view is that there was not a filled job. We are not seeking to impose an obligation here on the theory that even though the job were filled the union was wrong in not clearing the charging party for that job.

* * * * *

Mr Silverman: What Mr. Geltman has just said makes the necessity for my application all the more valid and important because during the course of the long investigation of this case it has never before been asserted, to my knowledge, that [20] the facts as we understood them to be were otherwise than as we understood them to be; namely, that the February incident involved a situation where a member of our union who had been assigned to a particular ship as a permanent assignment had been placed in a position where he was to be deprived of his job in order to make room for the charging party in this case.

For the first time today, I hear a statement to the effect that there is to be a claim that in February, during the occurrence of that incident, the job was not filled or that there was a vacancy.

Certainly I would have to do a great deal to meet such a claim, and as I say, this is the first time that that claim has been advanced.

Trial Examiner Scharnikow: As I take Mr. Geltman's statement—correct me if I am wrong—he is now asserting that on this theory of the case he intends to prove that there was a vacancy on both dates.

Mr. Geltman: Right. A similar situation on both occasions.

Trial Examiner Scharnikow: And that the alleged refusal of the steamship company to employ Mr. Fowler occurred when there was a vacancy which Mr. Fowler could fill.

Mr. Geltman: Right.

Willard C. Fowler—Direct.

Trial Examiner Scharnikow: On both occasions?

[21] Mr. Geltman: On both occasions.

Mr. Silverman: And the point I am making is that this is the first time that has been claimed to be the fact with reference to the February incident.

We never delved deeply into the facts because we thought it was undisputed that at least as far as the February incident was concerned, that another man was aboard the ship when that party sought clearance for that ship.

* * * * *

Trial Examiner Scharnikow: Why should I not permit the amendment to the complaint?

Mr. Silverman: I feel that the amendment to the complaint should not be admitted or motion should not be granted at this time for the reasons that I previously dwelled upon before.

The amendment to the complaint here in effect serves to substitute a new cause of action or at least to add a new cause of action to the cause of action which is alleged in the initial complaint. It injects an entirely separate and distinct occurrence, an occurrence of which the Board was fully advised and fully aware when the original complaint herein was served.

* * * * *

[23] Mr. Silverman: I, of course, except to the granting of that motion.

* * * * *

[29] Mr. Silverman: I object to it on the ground it is not binding on the respondent union.

Trial Examiner Scharnikow: The objection is overruled.

* * * * *

Willard C. Fowler—Direct.

Mr. Silverman: May I have an objection to these questions [30] which refer to conversations had not in the presence of the respondent as not binding on the respondent?

Trial Examiner Scharnikow: I will overrule the objection to the particular question.

Will you raise that from time to time? I am not sure whether or not if subsequent conversations are brought forth through this witness, whether I might not, in some instances, sustain that objection, depending upon what the proposed testimony would be.

[35] Mr. Silverman: Let me see if I make my position clear.

This relates to the February incident, and as I indicated at the outset in connection with my application for an adjournment, there may be certain phases of this February incident as to which proof is now being adduced, that I may not be adequately prepared to meet at this time; and so I wonder if I might have a reservation of objection to this line of questioning; this entire line of testimony with respect to this February incident because possibly the inadmissibility or impropriety of any proof that may be offered in connection with it may not conceivably be fully understood by me without a full and complete grasp of the situation.

Trial Examiner Scharnikow: The continuing objection is permitted.

* * * * *

[40] Mr. Silverman: I am going to object to a conversation between the witness and Mr. Frey with respect to a third party, the radio officer who was aboard the ship at the time, as not binding upon the respondent.

* * * * *

Willard C. Fowler—Direct.

Trial Examiner Scharnikow: I will overrule it.
Mr. Silverman: Exception.

Trial Examiner Scharnikow: I am not taking it
now on the question of whether there was an actual
vacancy.

* * * * *

[41] The Witness: He said he would rather stay on until
the next day and also to clear up the fact—you see, when
I asked him, "Are you going to stay on the ship," and he
says, "I don't know", he says, "I was only supposed to
come up for—bring the ship up for one trip but I want to
stay on if I can."

That is when I told him, I says, "The company is cer-
tainly not going to hire two radio operators."

* * * * *

[48] He gave me permission. And I said, "I will prob-
ably be leaving within a couple of days or so and there
is no other operator assigned to the ship," I said, "This
man is off and I can save hotel expenses by staying on the
ship."

Which Mr. Howe gave me permission to stay on the
ship Saturday night and—I mean—I am sorry—on Tues-
day night. That was Monday morning, and he gave me
permission to stay on the ship Tuesday—Monday night.

* * * * *

[49] A. I was in the radio operator's quarters. The radio
room and the operator's quarters are more or less com-
bined on the—adjoining.

And he came in and he says, "I have been assigned to
this ship as radio officer."

I said, "Did you get clearance from the union?"

And he says, "Yes."

I said, "Well, in that case", I says, "I will get my bags
off."

* * * * *

Willard C. Fowler—Direct.

[53] The Witness: I told him that this man's license had just been issued a month prior to his coming on the ship.

And I said, "Is he qualified for that job?" I says, "I have been out of work longer than that."

I says, "according to his license—he had just got his license on January 23rd."

And he said, "Well, that is no concern of yours," he said, "so just forget about it."

So that is the last conversation I had with Mr. Howe.

* * * * *

[55] Was there anything said between you and Mr. Howe indicating there was a place on the ship where you could stay? A. I told him I was going to stay in the radio operator's quarters.

Q. Was anything said as to whether or not the old radio operator was still there? A. Well, just in the previous conversation I had told him the radio operator had gotten off. * * * [56] I told * * * Mr. Howe—that the baggage had been moved off.

* * * * *

[60] Mr. Silverman: I am objecting again to this particular testimony as being a conversation outside the presence of the respondent, not binding in any way upon the respondent.

Trial Examiner Scharnikow: I will overrule the objection. It may continue.

* * * * *

[65] Mr. Silverman: I object to what somebody else told him not in the presence of the respondent, and I move to strike out that portion.

Trial Examiner Scharnikow: Is it material?

Willard C. Fowler—Direct.

Mr. Geltman: Yes, Mr. Trial Examiner, it relates to his turning down another available job should that contingency ever come up on the question of possible compliance—should it become material in compliance, which it well might, as to whether or not, for example, they offered him an equivalent position.

Trial Examiner Scharnikow: I will overrule the objection.

[66)] Mr. Silverman: Exception.

* * * * *

[67] Q. (By Mr. Geltman) Will you look at this please, and tell me what that is? It is General Counsel's Exhibit No. 8 for identification. A. That is the clearance Mr. Glynn gave me.

Q. Did it have this writing in pencil on top when you got it? A. No. I wrote—I found out the name and—

Q. Did it have everything else in it when you got it? A. Yes. Everything except that.

Mr. Geltman: I offer it without the pencil marking on top.

Mr. Silverman: No objection.

Mr. Geltman: I offer it in evidence.

Trial Examiner Scharnikow: General Counsel's Exhibit No. 8 is admitted in evidence.

(The document previously marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

* * * * *

[68] A. She kind of got mad. She brought out an application of employment form for me to fill out.

And I told her I had no papers with me.

Willard C. Fowler—Cross.

And she said, "You are supposed to carry those papers with you."

And I told her I had just arrived back in town and I had the bag with the papers in it checked at the station.

She said, "In that case, you cannot fill it out."

* * * * *

[76] Mr. Silverman: My objection runs likewise to these conversations with Mr. Frey, not in the presence of the respondent.

Trial Examiner Scharnikow: You are not alleging that the statement of the witness repeating what Mr. Howe said to him is 8(b)(3) or 8(b)(2), are you?

Mr. Geltman: As far as we are concerned, the value of what he has just said is limited to this: He told Mr. Frey the union would not clear him. Having seen Frey earlier and having been told by Frey to get a clearance from the union, he now reports he cannot get a clearance.

Trial Examiner Scharnikow: I overrule the objection.

Mr. Silverman: Exception.

* * * * *

WILLARD C. FOWLER, Cross.

[80] Q. When was your first job with the A. H. Bull Line?

* * * * *

The Witness: My first employment with the A. H. Bull Steamship Company was 7-30-43.

* * * * *

[81] Q. Will you briefly describe for us the rotary hiring system that was used by the Radio Officers' Union during the years you were a member of that union?

Willard C. Fowler—Cross.

Mr. Geltman: Objection. It doesn't bear on this phase of the Board's case. It may be relevant to the defense.

Trial Examiner Scharnikow: I cannot hear you.

Mr. Geltman: I say I object on the ground it does not bear on the affirmative case. It may be an element of defense.

Mr. Silverman: The witness referred to the rotary hiring system on a number of occasions during his testimony. I would like to have him explain it.

Mr. Geltman: We do not hang our case on the rotary hiring system.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: I respectfully except.

* * * * *

[82] Trial Examiner Scharnikow: You are not arguing that there was some impropriety in the union's departing from its own system, this rotary hiring system, in this witness' case?

Mr. Geltman: No, I am not.

* * * * *

[86] Q. You could also refrained from bidding on that job, could you not? A. Yes, that is correct.

* * * * *

[90] Q. In other words, there was nothing wrong with the ship that caused you to reject the employment aboard the Semmes, was there? A. The ship itself, no.

* * * * *

Q. Will you answer the question, please: Did you have any objection to the run that the Waterman Line, Raphael Semmes was scheduled to make on that occasion? A. I did not know what the run was.

* * * * *

Willard C. Fowler—Cross.

[92] Trial Examiner Scharnikow: You were asked did you hear anything at the office of the union while you were there that [93] morning?

A. That morning, no.

* * * * *

[99] Q. Did you ask for any clearance for a Bull Line ship? A. Not during that conversation, no.

Q. Did you say anything to him about the fact you wanted to sail only on a Bull Line ship? A. Not that particular point, no.

Q. When was the next time you knew anything about an actual opening aboard a Bull Line ship? [100] A. After the conversation you mean with Mr.—

Q. Howe, yes. A. When was the next time I knew of any opening for a Bull Line ship?

I didn't know of any after that conversation.

Q. Did you know of any at that time? A. After the phone conversation, I mean after the conversation with Mr. Frey, I knew there was an opening. There was an opening—

Q. There was an opening expected? A. There was an opening expected, that's right.

Q. There was an opening expected.

When was the opening expected to take place, do you know? A. That I cannot recall.

Q. Did you know aboard what ship this opening was expected to take place? A. Could you repeat that again?

I am trying to connect that with the conversation that I had with Mr. Frey.

Mr. Silverman: Would you read the last question, please, Mr. Reporter?

(Question read.)

The Witness: I do not recall. I do not remember.

Willard C. Fowler—Cross.

I remember there was an opening and—but I cannot just recall that one question you asked.

[101] Trial Examiner Scharnikow: Your only news about their being an opening in the Bull Line ship was what Mr. Frey told you?

The Witness: At that point and at the previous point.

Trial Examiner Scharnikow: That is all your information about the opening on a Bull Line ship was received during this period from Mr. Frey?

The Witness: That is correct.

Trial Examiner Scharnikow: Do you remember whether Mr. Frey told you on what boat he expected an opening, or on what ship; or don't you remember whether he mentioned a ship?

The Witness: I cannot recall too much of that conversation, and I am afraid if I answer it, it might, you know, incriminate me.

Trial Examiner Scharnikow: You cannot say whether Mr. Frey did mention the name of a ship?

The Witness: He mentioned the name of a ship to the nearest of my recollection, but that is—

Trial Examiner Scharnikow: But you cannot remember what that name was?

The Witness: I can—at this point I will say no.

Trial Examiner Scharnikow: But you cannot remember?

The Witness: I cannot remember.

Trial Examiner Scharnikow: The name?

[102] The Witness: The name.

Trial Examiner Scharnikow: But you do recall—

The Witness: There was one.

Trial Examiner Scharnikow: To the best of your recollection there was a mention of a name of a ship?

The Witness: That is right.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) Your recollection is that Mr. Frey mentioned a specific ship upon which he expected an opening? A. Not particularly, no. He said he has an opening.

Q. He was expecting an opening? A. He either had an opening or he had expected an opening.

Q. Let's review that for a couple of minutes, if we may.

You arrived in New York on April 22nd? A. April 22nd.

Q. 1948? A. Yes.

Q. Which was a Thursday? A. That is correct.

Q. Is that right? A. That is right.

Q. And went directly to the office of the Bull Line, or did you phone Mr. Frey? A. I phoned. I did not go directly.

Q. You phoned Mr. Frey, is that correct? A. That is correct.

[103] Q. And you told him you were back in town, is that right? A. That's right.

Q. And you asked him whether there was anything doing, is that correct? A. That's right.

Q. And he said "Well, keep in touch with me; something might come up in the next few days;" is that right? A. That's right.

Q. So that during the course of that particular conversation he did not mention any particular opening, did he? A. He may have, but I just don't recall offhand.

Q. Didn't he say in general terms, "Keep in touch with me, there may be an opening in a few days"? A. That was the general conversation.

Q. That was the gist of what he said? A. That's right. He may have mentioned the name of a ship, but I just cannot recall at that point.

Q. When was the next time you spoke to Mr. Frey after that? A. After the telephone conversation when I came in town?

..

Willard C. Fowler—Cross.

Q. Yes. A. The next time I spoke to him was—

The next time I remember speaking to him was after I came back off of the Semmes; but I may have spoken to him previous to that. I cannot recall.

Q. I know you may have, but do you have any recollection [104] of speaking to him between this telephone conversation of April 22nd and the personal conversation after you had been aboard the Semmes? A. That's right.

Q. Do you have any such recollection of any such conversation between those two dates? A. I cannot answer that because I don't remember.

Q. Now when you went to the union office on April 26th, 1948, Mr. Howe was not there; is that correct? A. That is correct.

• • • • •
A. I may have said hello to him but that was the extent of the conversation. I don't even recall seeing him.

Wait, wait, Excuse me.

Would you—I am confused.

• • • • •
[106] Q. Bearing that conversation in mind, you appeared at the union office on April 26th in the morning? A. Monday morning.

[107] Q. Is that right? A. That's right.

Q. You had at that time in your mind the information Mr. Frey had conveyed to you, an opening was expected aboard a Bull Line ship; is that right? A. I had it in mind, yes.

Q. With that in mind, and with the conversation you had had with Mr. Howe, Saturday, in mind, you bid for this job on the Waterman Line ship; is that right? A. With the facts in mind, yes.

Q. Did anyone threaten you in any way in connection with your acceptance of this assignment to the Waterman Line on that morning? A. Not at that point, no.

Willard C. Fowler—Cross.

Q. Did anyone threaten you with any consequences if you were to remain at the offices of the union and await a call for a man for a Bull Line ship? A. Not at that point, no.

Q. Did you ever ask any representative of the Radio Officers' Union to give you a clearance for the SS Evelyn? A. Will you repeat that question again?

Trial Examiner Scharnikow: Mr. Reporter, will you please read the question?

(Question read.)

The Witness: I did not exactly ask him. I had it in mind asking for a clearance.

[108] Q. (By Mr. Silverman) I assume from your last answer no one refused to give you a clearance for the SS Evelyn since you never asked for such a clearance, is that correct? A. That is correct.

Q. Had you had any difficulty in your relations with the Union at any time prior to February, 1948? A. Prior to February, 1948?

No.

[109] Q. He had never attempted in any way to interfere with your employment with the Bull Line, had he? A. No, he didn't.

Q. Did you ever attempt to question what Mr. Howe said to you [110] through any of the procedures provided for by the constitution and by-laws of the union? A. No.

Trial Examiner Scharnikow: Did you hear Mr. Frey at any time ask anyone for the union to give you a clearance?

Willard C. Fowler—Cross.

[111] The Witness No.

* * * * *

Q. (By Mr. Silverman) Did you at any time write or wire the union or communicate with them in any written form requesting a clearance to a Bull Line ship on or about April 26th, 1948? A. No, I did not.

Q. During the conversation you testified you had with Mr. Howe on Saturday or Friday, prior to April 26th—
A. With Mr. Howe?

Q. With Mr. Howe? A. That's right.

Q. On the Friday or Saturday prior to April 26th, you had in substance disagreed with him in his views and had taken the position you were entitled to an assignment to a Bull Line ship or any other ship, isn't that so? A. That is correct, yes.

[112] Q. So that you had had something of an argument or a discussion with him with respect to your rights to an assignment aboard a Bull Line ship? A. It was not an argument. It was a discussion.

Q. And you advanced the thought during the course of that discussion that as a member in good standing you were entitled to an assignment to a Bull Line ship, or any other ship you might select; isn't that so? A. That is correct.

Q. Having taken that position on the Friday or Saturday before April 26th, 1948, was there any reason why you did not follow through on that position in some concrete form?

Trial Examiner Scharnikow: Do you understand that question?

The Witness: Yes, I understand.

Trial Examiner Scharnikow: I am not sure that I understand it, nor will I understand an answer to that question.

Willard C. Fowler—Cross.

Mr. Silverman: It is vague.

Trial Examiner Scharnikow: Yes.

Read it back, please, Mr. Reporter.

Mr. Silverman: I thought the witness might gather my meaning, and his answer may supply the necessary clarity to it. It is an ambiguous question.

Trial Examiner Scharnikow: Do you want it read back?

Mr. Silverman: Yes, please read it.

[113] (Question read.)

Q. (By Mr. Silverman) Do you understand that question, Mr. Fowler?

The Witness: Yes, I understand the question, but it has got me up a tree.

• • • • •

I can say that I see your point in bringing it out.

• • • • •

[114] Q. Did you, after this conversation with Mr. Howe, attempt to appeal to the general chairman of the union or to the general committee of the union concerning Mr. Howe's position in the matter? A. No. I did not because they were not available at that point, at that particular point.

Q. Whatever pressure had been applied as you have described it, had been applied prior to this Friday or Saturday preceding April 26th, isn't that so?

Trial Examiner Scharnikow: That is Monday, April 26th; prior to Monday, April 26th.

Q. (By Mr. Silverman) Yes. On the Friday or Saturday prior [115] to Monday, April 26th.

Isn't that so? A. That is correct, yes.

Willard C. Fowler—Cross.

Mr. Geltman: I don't think the witness got the question with so many interruptions. Will you repeat it, please?

Trial Examiner Scharnikow: I think I perhaps interrupted. Let's hear the question again and let the witness answer it.

(Question read.)

Mr. Geltman: That is, had been applied prior to the Friday or Saturday.

Q. (By Mr. Silverman) On or prior? A. On or prior to the—

Q. On or prior to the Friday or Saturday preceding April 26th? A. Yes, that is so.

Q. There was nothing that happened in between Friday or Saturday preceding April 26th and April 26th, was there? A. Between Friday or Saturday preceding April 26th and April 26th?

Q. Let me simplify it. You have expressed some doubt as to whether this conversation took place on a Saturday or Friday. Do you mind if I refer to it as a Saturday, because I think that was your direct testimony. I think that will [116] simplify it.

Was there any pressure applied to you between Saturday, April 24th, and Monday, April 26th? A. No.

Q. You had no contact with Mr. Howe? A. I had not, that's right.

* * * * *

[118] Q. And you indicated to no one in the union office you were there for the purpose of taking an assignment aboard the Frances? A. That's right.

* * * * *

[122] Q. When you said you had come on the basis of his letter of the 25th, 1948, did you at that moment have

Willard C. Fowler—Cross.

anything in mind about your desire or willingness to take an assignment aboard a ship of some company other than the Bull Line? A. I had nothing in mind at that point, no.

* * * * *

[123] Q. During the course of that conversation, after he had [124] discussed it with you, didn't it also become your viewpoint that you would benefit by a change of companies? A. I don't recall that. Whether—I mean, that particular thing, no.

Q. When you finally left— A. I mean that was his idea of trying to get me to change away from the Bull Line, but—

Q. Didn't you agree with him at that time? A. Not particularly, no.

Q. Not particularly.

Trial Examiner Scharnikow: What do you mean by that, Mr. Fowler, "not particularly"?

The Witness: The idea of it was—I mean he was trying to change—I saw Mr. Howe's point of view. He figured that was his only way out, to get me to change.

Trial Examiner Scharnikow: The specific question is, did you or did you not say to Mr. Howe you agreed with him that it would be better for you to change lines?

The Witness: I do not recall saying that I agreed with him, no.

* * * * *

[125] Q. In other words, when you parted with Mr. Howe after this February incident, the entire misunderstanding with respect to the Frances had been straightened out? A. No, it had not been. It had not been exactly straightened out, but it had subsided to a point.

Willard C. Fowler—Cross.

Q. It subsided to the point where you said, "Okay, we will let the whole matter drop," isn't that so? A. Yes, I said that.

* * * * *

[130] Trial Examiner Scharnikow: I am disposed to grant an adjournment until next Monday. I think I will start the hearing at ten o'clock in the morning and we will get moving as fast as we can. That is what I intended to do.

Do you have any objections to that?

Mr. Silverman: My sole objection is that the adjournment is not sufficient, to my mind, to enable me adequately to meet the allegations of the amended complaint. And I will renew my application for a minimum adjournment of two weeks. And I have deliberately been conservative in fixing my request at two weeks because I have borne in mind the situation of the charging party and not because I feel that that will necessarily be adequate for the purposes of my proper preparation of the defense of the respondent.

* * * * *

[138] Q. Now I ask you whether it is not a fact you now know this telegram, Exhibit 4, was dispatched to you as a result of a complaint made to the union by Mr. Kozel. A. Evidently, yes.

* * * * *

[148] Q. Now, did you know what your position on the rotary hiring list was on February 26 or February 27 as compared with the position held on that list by Mr. Miller? * * * [149] A. I would say I was—I am saying that I was leading him; that is, I had preference over him.

Willard C. Fowler—Cross.

And how I establish that fact was by a conversation with him and also noting the time that his license was issued.

• • • • •

[150] Q. Did you know that Mr. Miller had been a member of the union since March 14, 1937, and held certificate Number 31 in the union? A. No, I did not.

Q. If I tell you that is the fact, would that have any influence upon your understanding as to the length of time that Mr. Miller had held a radio officers' license? A. Yes.

• • • • •

[160] Q. (By Mr. Silverman) Is it not a fact that during that conversation with him, you made the statement to him in words or substance to this effect, and I quote:

"If you are going to stay on," referring to Kozel, "I will forget about it."

A. Yes. I said that. That is when I told him to go down to the union the next morning and get it straightened out and I would be back later to see what his final answer was.

Q. As a matter of fact did you not also during the course of that conversation say to Mr. Kozel that you were going back to your hotel and that he should stay aboard? A. Yes, I said that.

• • • • •

[165] Q. Did you during all the period of this February incident know that the contract in existence between the Radio Officers' Union and the Bull Steamship line contained a provision to the effect that no radio officer could be discharged except for just cause?

Mr. Geltman: I object. It is immaterial what the witness understood.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: Exception.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) you were aboard the Frances on both February 27 and February 28, were you not? A. That is Friday and Saturday? Yes, that is correct.

* * * * *

[171] Q. When had you arrived in town prior to April 26? A. Can I refer to my—

[172] Mr. Geltman: You may refresh your recollection.

The Witness: That is, of the April incident, is it, Mr. Silverman?

Mr. Silverman: Yes.

The Witness: I arrived in New York on April 22.

Mr. Geltman: That is a—

Mr. Silverman: Thursday.

Mr. Geltman: Thursday.

Q. (By Mr. Silverman) Where did you go? A. After getting off the train I went to a hotel.

Q. What hotel? A. Can I ask a question?

Trial Examiner Scharnikow: Do you remember what it was?

The Witness: It is a little hazy. It could have been one of three hotels.

Trial Examiner Scharnikow: You don't remember which one?

The Witness: I know which one—I know the most likely one I would have went to, but I would not—I mean I cannot swear to it. The reason why—

Trial Examiner Scharnikow: You have answered the question. Let Mr. Silverman proceed.

Q. (By Mr. Silverman) Which of these three hotels do you believe it was, Mr. Fowler? A. Do I have to answer—give the name of it?

Willard C. Fowler—Cross.

Trial Examiner Scharnikow: If you can give the name of [173] the three hotels, one of which you might have gone to, go ahead.

The Witness: I cannot even recall the name. I tell you which hotel it was. It was the hotel—

Trial Examiner Scharnikow: All right, if you cannot—

The Witness: It could have been the hotel that was torn down, it is right across from the McAlpin Hotel on 34th—on 33rd and Broadway, because there is a vacant space in there.

Trial Examiner Scharnikow: Martinique?

The Witness: Martinique, that is the one that is torn down? That is the most likely hotel I would have went to.

Q. (By Mr. Silverman) What are the other two that it might have been? A. One is in Brooklyn. I cannot remember the name of it.

Trial Examiner Scharnikow: Saint George?

The Witness: No, it was not. It was in the Borough Hall section but it was right down near the waterfront. It is a pretty large hotel.

Q. (By Mr. Silverman) What about the third possibility?

A. The third was the Kenmore Hall.

Q. Which is where? A. That is on East 23rd Street.

Q. You remained at that hotel on Thursday, did you?

A. Yes.

Q. Did you remain there on Friday? [174] A. Yes.

Q. And on Saturday morning? A. This is—

Q. Give—

The Witness: Go ahead. I am sorry. Excuse me.

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) What were you going to say?
A. The question was, you were going to ask me about the incident.

Trial Examiner Scharnikow: Wait until you are asked. Let me have it clear in my mind: This is the second trip to New York, in April.

The Witness: In April, that is right.

Q. (By Mr. Silverman) You remained at the hotel, whichever one it was, on Thursday night, which would be April 22? A. That is right.

Q. And you remained there on Friday night which would be April 23; is that right? A. That's right.

* * * * *
I won't change—I cannot remember. I mean I had no reason to remember it. [175] I mean there was no basic reason for me to remember whether it was Friday or Saturday.

Q. Do you remember what time of the day it was on either of those days? A. Yes, it was in the morning.

Q. At about what time? A. Well, I cannot give you the exact hour because I don't remember that.

Q. Approximately? A. I would say approximately 9:30 to 10 o'clock.

Q. And how did you travel to the union on that morning, do you recall?

Trial Examiner Scharnikow: This was on Saturday morning.

Q. (By Mr. Silverman) On either Friday or Saturday?
A. Friday or Saturday.

Q. You are not definite? A. Most likely by subway.

Q. Do you remember which subway you took? A. It

Willard C. Fowler—Cross.

was most likely the BMT because that is the station nearest the Radio Officers' Union exit at 1440.

Q. Do you recall whether you traveled uptown or downtown? A. I traveled uptown. I mean I am definitely sure of that.

Q. Do you recall what station you got on? A. No, I cannot recall what station I got on.

Trial Examiner Scharnikow: Where is the union's office?

[176] The Witness: It is at 1440 Broadway. That is 41st Street and Broadway.

* * * * *

[184] Q. And as you sit on the stand you have no recollection of where you stopped during this period in April that you visited the office of the union on these two occasions? A. I have no recollection.

Excuse me. I withdraw that. Excuse me.

You state that I said I have no recollection. I did not say that. I says I stopped at one of three hotels.

* * * * *

[185] Q. Was it on the following day that you went to the United Fruit Line and the Socony Vacuum to apply for work? A. Yes, I think that is correct.

Q. Were you aware of the fact that the Standard Oil Company or Socony Vacuum assignment was made at the same time as the assignment was made to the S.S. Raphael Semmes? A. No. I was not aware of that.

Q. What tanker was this on which there was an opening on April 26? A. I cannot recall the name of the tanker or anything. All that was mentioned, there were two—all that was mentioned by Mr. Glynn, as near as I can remember, was there were two jobs available on the previous—on Monday, but I cannot remember the name or what tanker it was or anything about it.

Willard C. Fowler—Cross.

Q. You had no objection to working for the Standard Oil Company, did you? [186] A. Yes, I did.

Q. You did? A. I mean I am not—I withdraw that. I didn't prefer tankers. I mean I will change the answer to that and say that I preferred working on cargo vessels—in relation to tankers.

Q. What sort of vessels does Socony Vacuum operate? A. Tankers.

Q. You went down there to apply for a job. A. That is correct.

Q. Did you intend to take a job if one were available? A. Yes.

Q. Do you know that virtually every day after April 26th assignments were being given out in the office of the union to ships of various companies, including ships of Socony Vacuum? A. Yes.

• • • • •
[187] Trial Examiner Scharnikow: There is no question that if and when the Board should decide to issue an order, it should be taken up on compliance as to the extent of any loss of earnings award that might be made.

• • • • •
[189] Trial Examiner Scharnikow: And you would concede there was no other discrimination against this man with reference to his employment in the normal rotary hiring system as far as other companies are concerned?

Mr. Geltman: I do not allege any discrimination with reference to other companies.

Trial Examiner Scharnikow: I did not ask that. I can assume there was no discrimination, for what it is worth; isn't that right?

Mr. Geltman: Yes.

• • • • •

Willard C. Fowler—Cross.

Q. (By Mr. Silverman) Did you ever ask for a clearance for the S. S. Evelyn, Mr. Fowler? A. To name the particular ship, no. I mean to say the S. S. Evelyn, no.

.
[191] (By Mr. Silverman) Referring to the February incident, Mr. Fowler, when you called the union to advise them that Mr. Miller had shown up aboard the ship, what else did you say? And what was the purpose of that call?

Trial Examiner Scharnikow: First, what else did you say?

Q. (By Mr. Silverman) What else did you say? A. After I advised that Mr. Miller was aboard the ship? After I advised him that Mr. Miller was aboard the ship—

Q. When you say "him" you are referring to Mr. Howe? A. Yes. I am referring to Mr. Howe, that is right.

Then I said to Mr. Howe, I says, "I noted by his license that it had just been issued the month prior, it was just a [192] month old." I says, "Doesn't that put me ahead of him?"

Mr. Howe replied, "That is no concern of yours."

Q. And when you said, "Doesn't that put me ahead of him," that was in the nature of a complaint as to the propriety of giving Mr. Miller the assignment rather than you, was it not? A. Yes. I will say that it was in substance the nature of a complaint.

Q. In short, you were looking to the union to enforce certain rights which you felt you had in preference to any rights Mr. Miller might have had at that moment? A. Of Mr. Miller?

Q. Yes. A. Yes, that is correct.

.

Robert H. Frey—Direct.

WILLARD C. FOWLER, Re-direct.

[206] Q. (By Mr. Geltman) Did you in fact know during the week you were in town during the April incident that the job was a job on the Evelyn? A. No. I cannot recall whether it was—exactly the name of the ship, whether it was the Evelyn or not. I mean, I cannot recall just exactly the name of the ship was the Evelyn but I knew there was a job open.

• • • • •

WILLARD C. FOWLER, Re-cross.

[208] Q. In any event, you never asked for a clearance for any specific ship? • • •

• • • • •

A. I did not.

• • • • •

ROBERT H. FREY, Direct.

[228] Trial Examiner Scharnikow: Let it be understood that any statement by the witness in answer to Mr. Geltman's questions in which the term "offer of job" was used shall not be considered either by the Board or by the Trial Examiner as characterizing any part of the conversations between Fowler and the witness and that the testimony of the witness as to what was said shall be the basis and sole basis, so far as this witness is concerned, of what happened.

• • • • •

ROBERT H. FREY, Cross.

[229] Q. Do you have any indication in your file in any manner or [230] form that—to the effect that the assign-

Robert H. Frey—Cross.

ment of Mr. Kozel to the Frances at New Orleans was anything but a permanent assignment? A. No.

• • • • •

[232] Q. In any event, you told Mr. Kozel you had made arrangements then for a man to come up to replace him, Kozel? A. Yes, that is right.

Q. And he seemed to be perturbed about that? A. He seemed somewhat perturbed. He was not too overly excited.

Q. He did not accept that with good grace? A. Well, I would say not quite that way, no.

• • • • •

Q. You suggested to him that he make a complaint to the union? A. I made the suggestion that he call up the union about it.

Q. You told him in the course of that conversation his services were satisfactory? A. Oh, yes. He knew that.

Q. You had in mind at that time, did you not, Mr. Frey, that under the provisions of the agreement between the Bull Line Steamship Company and the union that no man is to be discharged except for cause. A. That is in the agreement, that is right.

• • • • •

[233] Q. (By Mr. Silverman) What was it that he said that indicated to you he was perturbed about your statement you had sent for a man to replace him? A. Well, I would not know. He did not say anything in particular as to why. On surface appearance only, I would say, he did not like being relieved.

In fact, he was never discharged from his job.

Q. Except to the extent you told him you had sent for a man to replace him? A. He could have still stood on the grounds he wanted to stay there.

• • • • •

Robert H. Frey—Cross.

[237] Q. Before Mr. Fowler left for Miami, he telephoned you to tell you he was leaving for Miami, is that right? A. That's right.

Q. Did he during the course of those few days prior to his departure for Miami tell you anything in words or substance to the effect that if he knew that Mr. Kozel had been assigned to the ship, he would not have come up from Miami? A. Not in that many words, no. Not exactly that way. But he did mention when he found out that Kozel was there and he was objecting to the union about being replaced—well, he would just skip it and return to Miami.

Q. In other words, he was not interested in pressing any issue as to whether or not he was entitled to replace Kozel or not; he was rather inclined to "skip it," as I think you put it; is that right? A. You might say in that way, yes. In other words, he did not want to create any trouble.

.

[238] Q. And he had taken the position that rather than create any additional unpleasantness as a result of Kozel's attitude that he would prefer to forget about the whole thing and go back to Miami, isn't that so? A. That is what I would gather from it, yes.

.

Q. Did you ask him where he was staying? A. He mentioned at the time he didn't know where he was going to stay. I did mention if he found out where he was going to be, he should let me know.

[239] Q. Did he ever let you know where he was going to be? A. No, he did not.

Q. And on the occasion that you have mentioned of that first telephone call, did you mention any specific opening to him that you had? A. Not when he first called me when he came in town, no, I did not. I was not aware of one then.

.

Robert H. Frey—Cross.

[243] Q. Did Mr. Fowler say anything to you on that occasion about having been out to look at the S. S. Raphael Semmes? A. No, he did not mention that to me. As far as my knowledge goes, I don't recall him mentioning it.

Q. Did you have any impression that he had been aboard a Waterman ship? A. No.

[245] Q. Was there anything said about back pay on the occasion of Mr. Fowler's visit in February? A. No.

[246] Q. In other words, at the time he came up at the end of February, 1948, would it not have been possible at that time to ascertain whether there was any back pay due him relating to voyages taken prior to January 2, 1948? A. Yes. He could have checked on it at that time if he wanted to.

Q. Now it frequently occurs, does it not, Mr. Frey, that a man who is aboard a vessel will, at the conclusion of that voyage, sign off ships articles and then sign on again? A. Yes.

Q. So there was nothing about Kozel's signing off articles on February 26 that precluded his again signing new articles for the subsequent voyage? A. No, I would not say so.

[261] So that the fact a particular man signs off ship's articles is not indicative of the fact he is severing permanently his relationship with that ship, is it? A. No, I would not say so.

[264] Q. You were aware of the fact, were you not, that the Bull Line was obligated to get a clearance from the

Fred M. Howe—Direct.

union before assigning a man to the ship, is that so? A. According to the agreement, yes.

Q. According to the agreement. And that word "clearance" in the contract appears in quotations, doesn't it, Mr. Frey? A. I am quite sure it does. May I see that?

Trial Examiner Scharnikow: It so appears from the contract.

Q. (By Mr. Silverman) And that has a pretty definite meaning and pretty definite connotations? A. I would say it would emphasize that.

• • • • •

FRED M. HOWE, Direct.

[283] Q. Where, in the constitution or by-laws, do you have any such right?

• • • • •

Mr. Silverman: I don't think this is a proper forum for the determination of the intraunion rights of the members or officers of the union. There is procedure established for the determination of this question within the union that every member has recourse to; and I do not think it is the province [284] of the Board to determine the propriety or lack of propriety of any action taken by an officer of a union with respect to a member.

• • • • •

[289] The Witness: Section 7, Article 7: "The general secretary-treasurer shall act as general chairman in all absences of the General Chairman."

• • • • •

Fred M. Howe—Direct.

- [291] And so that my position on the record may be complete, Mr. Trial Examiner, may I state it as my position that even in the absence of any such provision in the constitution and by-laws, it would be the inherent right of any union to take the action taken here on the facts as brought to the attention of the union officer here.

• • • • •

- [301] What day was this you had this conversation we have been talking about?

The Witness: My recollection was it was Friday. Friday afternoon.

Q. (By Mr. Geltman) Is it your testimony you really thought Fowler was going home that night to Miami? A. He said he was going home, yes, I presumed he would go home.

• • • • •

- [303] Trial Examiner Scharnikow: I did not put it very well, I admit that.

In the normal situation you got a call from a steamship company to the effect that they needed a radio officer; that is right?

The Witness: Yes, sir.

• • • • •

- [304] Trial Examiner Scharnikow: In view of the time fixed by the steamship company.

The Witness: Yes. What we do in actual practice, say Mr. Fowler gets to be number ten on the list. We write to Mr. Fowler—maybe answer his letter—they usually write to us first. We tell Mr. Fowler he is number ten and he can ship out anytime. He can ship out as easily with number ten as he can with number one, just as easily. So we

Fred M. Howe—Cross.

try to have these men who are on top of the list make themselves available for employment. If they want jobs, they have got to be where the jobs are.

Trial Examiner Scharnikow: By making themselves available, you mean come to New York and be within call of your office.

The Witness: That is right. We cannot possibly assign a man who is not in New York for a ship in New York. If he is in Miami, unless the ship is going to be here longer than the usual ship is—and the average call for a man to go aboard the ship is right away. In practice it is the same day, same [305] afternoon, with exceptions of course.

* * * * *

[308] Trial Examiner Scharnikow: In other words, when you send a man out, you give him two forms: one of the type of General Counsel's Exhibit 8, and the other of the type General Counsel's Exhibit 10, which is the blue form.

The Witness: Yes, sir.

Trial Examiner Scharnikow: In every case.

The Witness: In every case.

Trial Examiner Scharnikow: The blue form of the type [309] General Counsel's Exhibit 10 is to be delivered to the steamship company.

The Witness: That is right.

* * * * *

FRED M. HOWE, CROSS.

[310] Q. Did you have any other reason for believing that Mr. Fowler was aboard the Frances other than what Mr. Kozel had told you? A. I had no other way of knowing.

Q. Up until the time when Mr. Kozel told you and complained of the fact he was being discharged or replaced

Fred M. Howe—Cross.

aboard this vessel, did you have any feeling of bias or ill will or discrimination in any form—and I make those words as broad as I know how—against Mr. Fowler for any cause whatsoever? A. No. I had always thought Mr. Fowler was a very fine fellow. Still think he is personally.

.
[314] Q. (By Mr. Silverman) Now these rules which were in force in the New York office, Mr. Howe, functioned, as you have described to some extent in answer to questions by the Trial Examiner, I would like to clarify that a bit more if I may.

Is it a fact that when a man left a ship the date of quitting that ship became his shipping date? A. That is correct.

Q. And the man with the oldest shipping date would have first call on any job that might be available; is that right? A. He would be entitled to the job if he is available.

Q. If he is available.

As a practical matter, many members of your union, after leaving a ship, prefer to either make a vacation ashore or possibly attend to some other business and so do not always make themselves available for immediate reassignment; is that right? A. Very few of the members ship out immediately after their arrival.

Q. The membership of the union is constantly kept advised, is it not, of the approximate period of time—waiting time—that elapses between the last shipping date and the date of a new assignment; is that so? A. Yes. Every member who is waiting for a job has been advised of the approximate date when he may ship out.

[315] Q. As a practical matter, when a member of the union, after leaving one ship, reaches the point where he is about ready to ship out again, if he lives some distance from the union office he will, I assume, write or telephone

Fred M. Howe—Cross.

or communicate with you in some way for the purpose of ascertaining about how soon he could obtain an assignment; is that so? A. The average member contacts us many times from, say, a week or two weeks after he gets off the ship; he writes or telephones or sends telegrams until he is ready to ship again or until we are ready to ship him out.

• • • • •

[320] Q. (By Mr. Silverman) That was so, was it, in the days when there was virtually no time lapse between availability for employment and actual ability to get a job?

• • • • •

The Witness: Yes.

• • • • •

[322] Q. When Fowler left you after this conversation you described in some detail, was the atmosphere friendly or was there any animosity? A. This is the February incident you are talking about?

Q. Yes. A. Yes, very friendly.

• • • • •

[323] Q. (By Mr. Silverman) Let me ask you this question, Mr. Howe: When, in that letter which is General Counsel's Exhibit 6, you refer to a change of companies, did that have reference to the conversation or the portion of the conversation you have testified to with Mr. Fowler in which he agreed with you that there were advantages to diversifying his experience?

Mr. Geltman: Same objection.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: Exception.

• • • • •

Fred M. Howe—Cross.

[325] Q. Do you have any recollection of any incident at which you called Mr. Glynn into your office and requested he act as a witness to an offer of a job to Mr.— A. No, sir.

Q. (Continuing)—Fowler? A. No, sir.

[327] Q. (By Mr. Silverman) Mr. Howe, were you present in the office of the union on the morning of April 26, when the assignment to the S. S. Raphael Semmes was made? A. No, sir.

Q. Had you had any conversation with Mr. Fowler personally to the best of your recollection prior to the telephone conversation that you had with him on the afternoon of April 26, 1948, and I am referring to the April incident now? A. No, there were no conversations. I did not see him. Did not see the man at all during the month of April.

[331] Q. Did you during the course of this telephone conversation with him on April 26, 1948, have any knowledge of where he [332] was staying? A. No. He did not tell me and I did not ask him.

Q. Referring to the assignment you made on the 26th of April, 1948, can you tell us whether one of those assignments—

Trial Examiner Scharnikow: Are they exhibits now or are they personal papers of the witness?

Mr. Silverman: No, I don't think so.

Q. (By Mr. Silverman) Can you tell us by refreshing your recollection from your assignment records in any way whether an assignment was made on the 26th of April, 1948, to a tanker of the Socony Vacuum Oil Company?

Mr. Geltman: Objection.

Fred M. Howe—Cross.

Trial Examiner Scharnikow: This is on April 26th, isn't it?

Mr. Silverman: Yes.

Mr. Geltman: It does not apply to withholding of the job or offering of a job to Mr. Fowler.

Trial Examiner Scharnikow: What is the purpose of that, Mr. Silverman?

Mr. Silverman: There is testimony, as I understand it, Mr. Trial Examiner, of a willingness on the part of Fowler to work for the United Fruit Company or the Standard Oil Company of New York or Socony Vacuum.

Trial Examiner Scharnikow: Whose testimony was that?

Mr. Silverman: Mr. Fowler's testimony.

[333] Trial Examiner Scharnikow: Wasn't his testimony to the effect he did not want to work on a tanker but wanted to work on a cargo vessel?

Mr. Silverman: No. He testified he went to the Socony Vacuum for employment and they operate tankers.

Trial Examiner Scharnikow: Let's see what Mr. Silverman has on his mind.

Mr. Geltman: That is on the compliance question.

Mr. Silverman: No, it is not.

Trial Examiner Scharnikow: Let's see what Mr. Silverman has on his mind.

Mr. Silverman: It is more than the straight compliance question, Mr. Trial Examiner. He testified he declined the job aboard the Waterman Line ship because of some labor trouble he was told by somebody existed on the ship. This is an attempt to show there is an opening aboard a Socony Vacuum ship that he likewise had first choice on on that day.

Mr. Geltman: I will withdraw the objection.

Proceedings.

Trial Examiner Scharnikow: Go ahead. Let's see what develops.

Q. (By Mr. Silverman) Mr. Howe, do your records show whether an assignment was made on the 26th of April, 1948, to a ship of the Socony Vacuum Oil Company? A. Yes.

Q. Was such an assignment made on that date? [334] A. Yes.

Q. What was the name of the ships? A. Stony Point a T-2 tanker.

* * * * *

PROCEEDINGS.

[340] Trial Examiner Scharnikow: * * * [341] Are you free to make any statement, Mr. Silverman, as to whether or not there was any break in the good standing of Mr. Fowler's membership in the union other than this break on February 27th?

Mr. Silverman: Well, Mr. Trial Examiner, the answer that I may briefly give to that is as follows: Good standing in the union has always had an interpretation that was not necessarily limited to the question of whether a man was paid up in his dues or not. There are likewise various types of good standing. A man may be in good standing for certain purposes and not for certain other purposes. Thus, for example, a man who is paid up in his dues may request assignment or maybe, because of his priority in shipping date, may seek assignment to a ship; if the man at that particular moment is under the influence of liquor, if something else exists in connection with him that would make

Proceedings.

assignment to a particular ship or the granting of a clearance improper, that is something which the union has always taken into consideration as determining good standing for that particular assignment or for that particular purpose as well as the question of non-payment of dues and initiation fees. I am referring, of course, now, to the period prior to August, 1948.

* * * * *

[345] Mr. Geltman: I have no further witnesses at this time. I rest. That is, general counsel rests.

Mr. Silverman: Now at this time, Mr. Trial Examiner, the respondent moves to strike out all testimony given by Mr. Fowler and by Mr. Frey relating to any conversations had between Mr. Fowler and Mr. Frey or Mr. Fowler and any member [346] of the Radio Officers' Union and between Mr. Fowler and any person or persons aboard either the Steamship Frances or the Steamship Evelyn except insofar as such conversations were testified as having been brought home to Mr. Howe or to Mr. Glynn, on the ground that any such conversations not brought home to Mr. Howe, not brought home to Mr. Glynn, are not binding in any way upon the respondent and were not in the presence of the respondent or shown to have been brought home to any representatives of the respondent.

Trial Examiner Scharnikow: We have taken the testimony. Some of the grounds of your present motion to strike have already been urged as objections and some have not.

I am going to deny the motion without prejudice to your arguments as to the materiality and relevance of any of the conversations.

*Motion to Strike Out Testimony.
Motion to Dismiss Complaint.*

Mr. Silverman: And I respectfully except.

Now, I move to strike all testimony to which objection was made and the testimony of the type to which objection was made under a general objection, which testimony was taken by the Trial Examiner subject to connection and subject to a subsequent motion to strike.

Trial Examiner Scharnikow: Same ruling on that. I will deny the motion.

Mr. Silverman: Exception.

I now move to dismiss the complaint on the ground that [347] the facts adduced by counsel for the general counsel have wholly failed to sustain the allegations of the complaint.

Trial Examiner Scharnikow: I will deny that motion without prejudice to its renewal by an appropriate motion during the balance of the hearing and also on argument at the close of the hearing.

Mr. Silverman: Mr. Trial Examiner, would you care to hear argument on that motion at the present time?

Trial Examiner Scharnikow: I do not believe so.

Mr. Silverman: Then I will except to the denial of my motion at this time.

Trial Examiner Scharnikow: You see, actually we have only a comparatively few incidents here. The hearing has been short.

You may proceed.

Mr. Silverman: Mr. Howe, will you take the stand, please.

• • • • •

Fred M. Howe—Direct.

FRED M. HOWE, Direct.

[349] Q. Mr. Fowler has testified here that on or about March the 2nd, I believe it was, when Mr. Miller—after Mr. Miller had been assigned to the Steamship Frances he telephoned you and stated in substance that the new man had come aboard the ship and that the new man had a license which was only one month old, and that he, Fowler, had been out of work longer and that you stated to him that that was no concern of his. Did you have any such conversation with Mr. Fowler, to the best of your recollection? A. No, sir. No such conversation took place.

Q. Did you after your conversation with Mr. Fowler subsequent to the sending of the telegram receive any word from Mr. Fowler to lead you to believe that he had not returned to Miami as he had stated he was going to? A. No. There was no word from him directly or indirectly. I assumed he had gone to Miami.

Q. And was that your understanding and your belief at the time that Mr. Miller was assigned to the Steamship Frances? A. Yes, sir.

Q. Now, will you please tell us by reference to your records what Mr. Miller's last shipping date prior to his assignment to the Frances was? A. It was November 17, 1947, which was the day he left the Moline Victory operated by Seas Shipping Company at Baltimore. [350] That became his shipping date and that determined his position on the shipping list.

Trial Examiner Scharnikow: Is that the date he shipped on that voyage?

The Witness: That is the date he left the ship.

Trial Examiner Scharnikow: Left the ship?

The Witness: He quit the ship.

Fred M. Howe—Direct.

Q. (By Mr. Silverman) That date corresponds, for example, with the date of January 2, 1948, which was the date on which Mr. Fowler had left the Hilton; is that correct? A. It corresponded in this effect, that Mr. Fowler's position on the list would be determined by the date he left the Hilton.

Q. And when the date of January 2 is referred to as Mr. Fowler's shipping date— A. Yes.

Q. (Continuing) —by reason of the fact he left the Hilton on that date, is that correct? A. Yes.

Q. Mr. Miller's shipping date is determined the same way as November 17, 1947, that being the date on which he had left the Moline? A. Yes.

• • • • •

[351] Q. In the practical operation and the interpretation of the agreement between the Radio Officers' Union and the various companies which are signatory thereto, has any company, and I include in this question the Bull Line Company, ever maintained that the union was obligated to grant a clearance to a man who was paid up in his dues, regardless of what other considerations might exist for a refusal to issue a clearance?

Mr. Geltman: Objection.

Q. (By Mr. Silverman) (Continuing) For example—

Mr. Silverman: May I just finish the question?

Mr. Geltman: I am sorry.

Q. (By Mr. Silverman) (Continuing) For example, when the union might know that the granting of such a clearance would imply consent to the discharge of another man.

Mr. Geltman: Objection. The agreement speaks for itself.

Fred M. Howe—Direct.

Trial Examiner Scharnikow: I have a difficulty with the question, Mr. Silverman.

I am going to sustain the objection.

I should state that I am sustaining the objection on the ground urged by Mr. Geltman.

Mr. Silverman: The ground being that—

Trial Examiner Scharnikow: That the agreement, Section 6 of Article 1, Respondent's Exhibit No. 2, is the controlling contract provision.

Mr. Silverman: Does your ruling imply, Mr. Trial Examiner, [352] that the agreement is complete and unambiguous in its terms so that proof of practical operation and interpretation by the parties would be inadmissible?

Mr. Geltman: The agreement sets out the relevant provision.

Trial Examiner Scharnikow: I have been asked the question, Mr. Geltman.

Mr. Geltman: I am sorry.

Trial Examiner Scharnikow: Yes.

Mr. Silverman: I respectfully except.

Q. (By Mr. Silverman) Mr. Howe, the agreement in evidence as Respondent's Exhibit No. 2, in Article 1, Section 6, provides amongst other things that the "company agrees to take appropriate measures to assure that such members are in good standing."

Has the nature of the appropriate measures which companies have been required to take and have taken under the provisions of this agreement, been a matter of understanding and practice between the union and the company over a period of years?

Mr. Geltman: Objection.

Trial Examiner Scharnikow: I will sustain the objection.

Fred M. Howe—Direct.

Mr. Silverman: I respectfully except.

Q. (By Mr. Silverman) I further observe that in Article 1, Section 6, there is language to the effect that the union [353] agrees to grant all members of the union in good standing the necessary "clearance" for the position to which the radio officer has been assigned.

Has the word "clearance" which is contained in quotation marks in the agreement been the subject of understanding and practice between the union and the various companies with which it is under contract?

Mr. Geltman: Objection.

Trial Examiner Scharnikow: I will sustain the objection to the question as it is worded.

I suggest the possibility that you might inquire as to any disputes, actual disputes that have arisen as to the term "clearance" used in that section of the contract.

Q. (By Mr. Silverman) Had there, prior to this February incident of 1948, Mr. Howe, ever been any disputes between the union and any line and particularly the Bull Line with respect to the issuance of a clearance in situations where the issuance of such a clearance would involve the "bumping" or replacing of another man?

Mr. Geltman: Objection. The question does not relate to "clearance" at all. It relates to an interpretation of the contract in other respects; and, moreover, it also relates to controversies between other lines and the union and not the Bull Line.

Trial Examiner Scharnikow: I will overrule the objection. [354] You may answer the question.

The Witness: May I have it read, please?

Fred M. Howe—Direct.

Trial Examiner Scharnikow: Mr. Reporter, will you please read the question?

(Question read.)

The Witness: I do not recall any disputes regarding that.

I do not recall any company other than the Bull Line that engaged in "bumping".

I have been questioned about a clearance in reference to good standing, the good standing of a member. But no disputes.

* * * * *

[368] Q. (By Mr. Silverman) Mr. Howe, there are many members, are there not, who will depart from a ship, thereby establishing a certain shipping date, and who may not be interested in shipping out for a considerable period of time after that; is that not so? A. There are a great number that do that, who take lengthy vacations. Some never do return to the sea again.

Q. On the other hand, there are some who after a short absence from the sea will notify you of an interest in shipping out again? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Will the union thereupon indicate to each and every member who inquires with respect to that the approximate length of time that is then elapsing between his shipping date and the time of availability of his next assignment? A. Not only do we tell them but we answer every letter that is written, any inquiry is responded to by us giving the [369] man the exact information and as good an estimate of the waiting time that we think will be required for him to get a job.

Q. Predicated upon the information which you so give the man, he is enabled to guide himself as to the date

Fred M. Howe—Direct.

when he can come up and get an assignment; is that so? A. Within a very few days.

Q. If the man for any reason of his own, despite knowledge of the fact he can get a job, prefers to do something else or remain on vacation, he is free to do that, isn't that so? A. That is correct. He may work at some shore job, if he wishes, and still retain his number on the list.

Q. As likewise indicates of a man who is desirous to ship out again, he comes to the Union Hall or otherwise signifies his desire for an assignment and is free then to bid upon any job that may be open when he appears at the Union Hall; is that so? A. Yes, sir.

Q. For example, when you wrote to Mr. Fowler in this letter of March 26, 1948, which is General Counsel's Exhibit 6, and you made the statement, as I quote:

"Your name will be sufficiently high on the list so that you can obtain a good assignment without waiting for more than a day or two, and this only so you may select the type of ship you desire."

[370] Is that information typical of information which the union is constantly furnishing its members? A. That is typical and it is truthful.

Q. And so upon receipt of information of that type, any member is free to signify his desire to obtain a ship by coming to the union and bidding on any particular type of ship that may be open? A. Yes.

.

Q. Does it happen from time to time that a man will appear at the union hall apparently interested in a job and then absent himself from the hall because of possibly his having obtained another job or a different type of job or changed [371] his mind about shipping or anything of that sort? Does that happen? A. You mean another ship job or a shore job?

Q. Shore job possibly? A. Yes, they come in and ask

Fred M. Howe—Direct.

me how shipping is every day, and they may come back the next day and may come back in a week or may never come back.

Q. The reason they never come back is a reason entirely personal to the individual involved? A. Yes.

Q. Or a man may show up today at the union office and bid on a job and/or refrain from bidding on a job and then you may never see him again for some reason you know nothing about; is that so? A. That is correct, yes.

* * * * *

[372] A. It was given out in exactly the same manner before every member who was in the hall at the time.

* * * * *

[373] Q. (By Mr. Silverman) We have had full testimony concerning the telegram which was sent February 27, 1948? A. Yes.

Q. Was there any reason for sending that telegram other than the complaint made to you by Kozell with respect to his— A. No other reason at all.

Q. Was there anything you had against Fowler which was in any way connected with any union activity or lack of union activity on his part? A. Fowler and I had never had any disputes even of the minutest kind or disagreement over anything. And I had thought Mr. Fowler was a very fine gentleman; and I repeat again today I still think he is personally.

Q. Was there anything Fowler had done in connection with the Radio Officers' Union or any other union that would have caused you to take any action in the direction of treating him [374] any differently than any other member of the union? A. Positively not.

* * * * *

[378] Trial Examiner Scharnikow: Well of course I think it is [379] clear that the term "clearance" as

Fred M. Howe—Cross.

used by the witnesses here and in the contract, Respondent's Exhibit 2, means merely that the union has assented to the hire of the particular union member.

* * * * *

FRED M. HOWE, Cross.

[392] Q. (By Mr. Geltman) With relation to the time when you gave Miller the job, that is a starting position already. A. The call came from either Captain Williams or Mr. Kiggins. Did not come from Mr. Frey. Mr. Frey was out of the picture.

* * * * *

[417] Q. When you wrote to him in March sending back his dues card, you wrote, "I am sure you will enjoy and benefit by a change in companies"

* * * * *

What did you mean by that?

* * * * *

[418] A. I stated yesterday when Mr. Fowler came in my office we had a rather lengthy conversation and discussed shipping and shipping on the Bull Line ships and the like of that, other ships. And I explained to Mr. Fowler that we did not have any Bull Line ships but that did not mean that Mr. Fowler would have to starve because there were no Bull Line ships, that he could ship on another ship or other ships, we had other very fine ships and he could take one of those ships anytime, practically, under the rules of our assignment rules. I explained to Mr. Fowler the advantages, how he himself would benefit personally by shipping on a variety of ships and a variety of companies, and going to different parts of the world, it would broaden his mind and broaden his experience and make him more efficient as a radio officer, and I told

Fred M. Howe—Re-direct.

many men the same thing. Mr. Fowler went away as I considered—

* * * * *

[419] A. He stated at the conclusion that he would ship out on some other ship and I had convinced him he should try some other line for his own benefit, that he need not necessarily confine himself to the Bull Line in the future.

* * * * *

[420] Q. (By Mr. Geltman) Mr. Fowler made it clear to you in April, did he not, in that conversation, that he was up from Miami solely for the purpose of getting a job on a Bull Line ship? [421] A. No. No, he did not make that clear to me at all.

* * * * *

FRED M. HOWE, Re-direct.

[426] Q. There are situations, I presume, that a man notifies you he is leaving the ship and the company may, for example, elect to tie it up so that you never do receive a call for that ship, is that so? A. That is correct.

* * * * *

Q. I show you a paper and ask whether this is the reply which you received to that letter.

Trial Examiner Scharnikow: Mark it, please.

The Witness: Yes.

Trial Examiner Scharnikow: Respondent's Exhibit No. 4.

(Whereupon, the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

Mr. Silverman: I offer it in evidence.

The Witness: Could we substitute a photostat for that?

Fred M. Howe—Re-direct.

Mr. Silverman: Yes. I am going to ask leave to substitute a copy for that.

Mr. Geltman: No objection.

Trial Examiner Scharnikow: Respondent's Exhibit No. 4 is admitted in evidence, and permission is granted to substitute [427] a photostat.

(Whereupon, the document previously marked Respondent's Exhibit No. 4 for identification was received in evidence.)

* * * * *

Q. (By Mr. Silverman) I believe the record is clear on this, but to make certain I would like to ask one more, if I may: Did Mr. Fowler ever show up at the office of the union after this telephone conversation that you had with him on April 26, 1948? A. No. I had never seen Mr. Fowler since that day until I saw him here a couple of days ago.

Q. Do you know, based upon Mr. Fowler's shipping date of January 2, 1948, whether he could have obtained an assignment aboard a vessel prior to April 26, 1948? Do you follow my question? A. Yes. He could obtain a job any time prior to that date.

Q. More specifically, when you wrote him your letter of March 25, 1948, which is General Counsel's Exhibit No. 6, [428] was it a fact that shipping conditions then were such that had Mr. Fowler elected to come up on let us say April 1 rather than April 26 that he could have obtained a ship within a day, within a matter of a day or two after April 1? A. That is correct, at that time, he could.

Q. And his remaining in Miami until April 26 was something over which you had no control, no right of interference; is that correct? A. That is correct.

Q. In short, there were available jobs he could have

Joseph P. Glynn—Direct.

come and had at any time; and the way in which he could signify or would signify his readiness for taking a job was by coming up and apprising the union of that readiness; is that right? A. We gave out close to 300 jobs between those dates.

• • • • •

JOSEPH P. GLYNN, Direct.

[429] Q. During the latter part of February, 1948, did some information reach you that had a bearing on the Steamship Frances? A. I won't exactly say that.

However, I will tell you what happened.

Q. Go right ahead. A. Roughly on February 24 or possibly the 25th in the morning Mr. Alexander Kozell came to the office. He was looking for Mr. Howe, and I told him Mr. Howe was not there at the time and asked him if I could help him; and in substance he gave me the following story.

He said he was aboard the S. S. Frances, and that he had reason to believe that an attempt was going to be made to "bump" him from that ship. I don't know if he used the exact [430] word "bumped," but that is the substance of it.

I thereupon asked him if he could figure out any reason why the company should attempt to remove him; had he had any arguments with the master or any arguments with shoreside personnel of the company.

To that he stated no; the only thing he knew was that he was told—I don't know whether it was by Mr. Frey or by the Bull Line or by the agents or the master or by whom he was told; he stated a man was coming up from Miami to relieve him.

Q. What else occurred during that conversation? What did you tell Mr. Kozell, or how did the conversation ter-

Joseph P. Glynn—Direct.

minate? A. After he told me that, I said, "Do you want to stay aboard the ship?"

And he said, "Yes, I would very much like to stay aboard the ship."

I said, "In that case I would suggest you come back at a time when Mr. Howe is in the office."

Thereupon he asked me what time that would be, and I said normally Mr. Howe does not come in until the afternoon, 11, 12, 1 o'clock, no particular definite time.

Q. Did he return to the ship, do you know? A. You mean the same day or a later day?

Q. Yes. A. I cannot swear he returned that same day. But I did see [431] Mr. Kozell again during the month of February, 1948, whether the same day or the day after, I don't know.

Q. On that subsequent occasion did you have a discussion with him or did he have a discussion with Mr. Howe?

A. No. I may have nodded to him, recognizing the man, but as I recall, he spoke to Mr. Howe.

Q. Did you have any other connection with the incident that occurred in February with reference to the Frances?

A. As far as I know, that was my only contact or my only interest in the February incident.

I spoke to Mr. Kozell on that morning and referred him to Mr. Howe.

• • • • •

JOSEPH P. GLYNN, Re-direct.

[447] Q. (By Mr. Silverman) I show you a batch of four clearance slips and ask you if you recognize these as being copies of clearances issued by the Radio Officers' Union on April 26, 1948? A. Yes, that is right.

Mr. Silverman: I offer them in evidence.

Mr. Geltman: May I see them?

[448] No objection.

Joseph P. Glynn—Re-direct.

Trial Examiner Scharnikow: Respondent's Exhibits 5, 6, 7 and 8 are admitted in evidence.

(Whereupon the documents previously marked Respondent's Exhibits Nos. 5, 6, 7 and 8 for identification were received in evidence.)

* * * * *

Q. (By Mr. Silverman) Refreshing your recollection, Mr. Glynn, by reference to Respondent's Exhibit 7 which I now show you, can you tell me who it was that was cleared for the S. S. Raphael Semmes and on what date, after Mr. Fowler's indication that he did not want to take this assignment? A. Well, it states right on the assignment slip here that John I. Henry was assigned to the S. S. Raphael Semmes on April 26, 1948.

Q. Does that date appear on that particular assignment slip or does that appear in the batch of these clearances? A. That's right. They are stapled together and the date is on the top one. The assignment of the top one is immaterial. I should say it could show on any one of them on the top when they are stapled together.

Q. Does this batch of four clearances likewise contain the clearance which has been issued to Fowler on the morning of April 26 with the notation across it indicating it was "cancelled"? A. Yes, that is right.

Q. I observe Respondent's Exhibit No. 6 is a clearance [449] issued to Mr. Clinton E. Whitehurst for the S. S. Stony Point operated by Socony Vacuum Oil Company, which is signed likewise by you.

Did you make that assignment on that day?

A. That's right.

Q. I observe also on April 26 there is an assignment or clearance issued to Harold R. Tobias for the S. S. Fort Moultrie which appears to bear your signature, and I ask you whether you recall making that assignment on that day? A. Yes.

Colloquy.

Q. Now, at the time when Mr. Fowler bid on this job aboard the S. S. Raphael Semmes, was anything said directly or indirectly or was anything implied to the effect he was required or that he was under compulsion to bid for the opening aboard the S. S. Raphael Semmes? A. The Radio Officers' Union has never forced any member to accept any particular assignment. The man is free to reject any assignment he does not care to take.

* * * * *

[450] Trial Examiner Scharnikow: From time to time in other connections evidence has come in which would also have a bearing on that question. Do I take it should the Board find a violation of the Act by the respondent union that the general counsel is pressing for a back-pay award?

Mr. Geltman: That is correct.

Mr. Silverman: It is?

Trial Examiner Scharnikow: As being appropriate under the facts?

Mr. Geltman: Yes, sir.

Trial Examiner Scharnikow: Would you dispute the fact that Mr. Fowler could have received assignments and jobs on vessels of steamship companies other than the Bull Steamship Company?

Mr. Geltman: It is our position that he at no time withdrew from the labor market; that he did not deliberately incur any loss; that the reason he did not get a job which he would have otherwise received was the wrong of the union here; and that the union here should remedy that wrong, put him back where he would have been.

Trial Examiner Scharnikow: Assuming the Board should [451] find a violation of the Act by the union here, in substance it would be the union's deprivation

Colloquy.

of Mr. Fowler of any job with the Bull Steamship Company, wouldn't it?

Mr. Geltman: That is right.

Trial Examiner Scharnikow: Not the deprivation of any job with any other steamship company?

* * * * *

Trial Examiner Scharnikow: Let's narrow this question down. I may be breaking in a little out of turn here, but let me ask you this question:

Is the general counsel pressing for an award to indemnify Mr. Fowler for his loss of earnings from the date of the February incident on to the date of the April incident?

Mr. Geltman: Yes, sir, we are.

Trial Examiner Scharnikow: There is no dispute in connection with that period, is there, that Mr. Fowler could have, through the union, secured positions with other steamship companies other than the Bull Steamship Company?

Mr. Geltman: There is no dispute, no, that after he saw Mr. Howe and after the telegram was received and he came and saw Mr. Howe, he could have received a job through the union [452] with another steamship company. However, it is our position that in view of the circumstances, the man having come up from Miami to take a particular job, you have a complete reorientation at that point and a demand the man do something his whole trip was not geared to do.

Trial Examiner Scharnikow: You have an analogous situation in 8(a)(3) cases where a man is discharged by an employer discriminatorily, and it is true there, too, he is deprived of employment by that employer.

Mr. Geltman: But my view is this—

Colloquy.

Trial Examiner Scharnikow: Just to carry that through, the analogy that gives me some concern is that you now urge that in a roughly parallel case where union discrimination may be found in depriving an applicant for employment, employment by one company but not by other companies, that the possibility of the other jobs with the other companies might very well be considered as wiping out the award for back pay.

To follow through on something else you said, though: You do contend that so far as the April incident is concerned, there was not only a refusal to issue a clearance on a Bull Steamship job but a clearance on any job.

Mr. Geltman: Yes, sir. And I have thought, too, of the analogy in 8(a)(3) cases, and it boils down to this in my mind, if I may expound for a couple of minutes on this point.

Trial Examiner Scharnikow: Yes.

[453] Mr. Geltman: Take a man who goes to the plant of Mr. Jones to get a job, and Jones says, "I will not take you for discriminatory reasons," spelling them out, "not in this plant; you might, let us say, be of some value to my friend, Smith, next door. He does not care. In his plant he has always got bad influences. He will pay you the same as I would pay you, and if I call him up and tell him you are coming, he will take you. It is only a block away and the working conditions are the same." I say that is discrimination in original choice, and you cannot force discrimination in original choice although you know thereafter the man should not have himself removed from the labor market.

Trial Examiner Scharnikow: I raised the question because I would like to know how you gentlemen feel about whether we have an issue by reason

Colloquy.

of the seepage in of this type of testimony, as to whether the Board on the basis of the record made at this hearing at this stage is to consider whether any compensatory award should be made.

Do I have it in your opinion now or don't I? Do I have that question before me?

Mr. Geltman: You do have that question before you.

Trial Examiner Scharnikow: In spite of the usual rule that that sort of question is deferred to the compliance stage?

Mr. Geltman: I think that question is before you at [454] this time.

Trial Examiner Scharnikow: Do you so understand?

In other words, I am asking you in effect whether, notwithstanding the usual rule that this sort of question is deferred until we get to the question of compliance, if ever, whether you believe that because of the evidence which has been submitted in gradual stages, in view of that evidence I now have before me all the evidence which you think is pertinent on this normal compliance question? Will I have that—

Mr. Geltman: I think you do.

Trial Examiner Scharnikow: Or do you still submit that notwithstanding I have some evidence which is relevant on that question, the question itself should be deferred to the point when, as and if a Board order issues?

Mr. Geltman: It is my view that a back-pay order here is warranted similar to one—

Trial Examiner Scharnikow: I know that is your position.

Mr. Geltman: Yes.

• • • • •

Robert H. Frey--Re-cross.

ROBERT H. FREY, Re-cross.

[462] Q. (By Mr. Silverman) Mr. Frey, when a member of the crew of a vessel signs off articles at the termination of a voyage, if that member is unsatisfactory to the master of the vessel and the master wants to discharge him, is that man placed on the port pay payroll? A. No.

Q. Mr. Kozell signed off his articles on February 20, 1948; is that right? A. According to the copy of the articles, that is correct.

Q. And he was kept on the port payroll until at least February 26, 1948; is that correct? A. That is what our records indicate.

Q. And that, as I understand it, is indication of the fact that Mr. Kozell had not been discharged by the master of the vessel and his services were satisfactory to the master of the vessel, is that correct? A. That is correct.

* * * * *

ROBERT H. FREY, Re-direct.

[468] Q. Had you sent for Fowler directly or indirectly? A. No.

Q. In connection with the opening aboard the Evelyn? A. No.

* * * * *

[474] Q. In the course of this April incident, was anything done by the union to indicate that any action of any nature would be taken in the event that you assigned Fowler to the S. S. [475] Evelyn? A. No. There was no action taken.

Q. Was any threat of any action taken on April 26 or thereabouts? A. No, not to my knowledge, except that as I mentioned before—

Q. I am speaking of April now. A. That's right. That is what I am speaking of, too.

Argument on Behalf of General Counsel.

Except in the conversation with Mr. Howe, he said he would not assign him to the Evelyn or any Bull Line ship.

Q. Did you ever invoke or attempt to invoke the grievance procedure provided for in the agreement which is Respondent's Exhibit No. 2 in connection with any refusal or alleged refusal to issue a clearance to Mr. Fowler?

Mr. Geltman: Objection. This is very far removed from the direct examination.

Trial Examiner Scharnikow: I will sustain the objection.

Mr. Silverman: I respectfully except.

* * * * *

COLLOQUY.

ARGUMENT ON BEHALF OF GENERAL COUNSEL.

[486] Trial Examiner Scharnikow: You are not making any argument, then, that this "bumping" which Mr. Howe testified he suspected of Mr. Fowler's having done would not have been the proper ground for a suspension of Mr. Fowler from union membership if the proper mechanics had been followed?

Mr. Geltman: No. I am making no such contention. I am saying the mechanics were not followed as between him and his union.

Trial Examiner Scharnikow: You would concede—of course this is academic, but just to understand your position thoroughly—if the mechanics had been followed here—

Mr. Geltman: Had he been suspended properly, I do concede now that he would not be entitled to that protection; [487] they would be within their rights in withholding a clearance from the man.

* * * * *

Argument on Behalf of the Respondent Union.

ARGUMENT ON BEHALF OF THE RESPONDENT UNION

[491] Mr. Silverman: * * * Just separating that for a moment, it appears perfectly clear to me that the latter portion of Section 8(b)(2) is not applicable.

Trial Examiner Scharnikow: There is no question about that, is there?

Mr. Geltman: No.

* * * * *

Trial Examiner Scharnikow: What about Mr. Geltman's argument that there was not an effective removal of Fowler from membership in good standing because Howe did not secure the assent of the general committee nor did he first give Fowler a warning as is apparently required by the by-laws? What is your position on that?

* * * * *

Mr. Silverman: Mr. Trial Examiner, the provisions of the constitution fairly read—in the first place, there is a provision that has not been called to your attention to the effect the general chairman shall interpret the by-laws of the Radio Officers' Union and the Commercial Telegraphers Union constitution on behalf of the Radio Officers' Union, with final decision resting with the International President of the Commercial Telegraphers Union. That is Article 7, Section 6, I believe it is. And in the absence of the general chairman of course the general secretary-treasurer is empowered to act [498] as the general chairman.

Now I certainly say that Article 7, Section 3 and Article 17, Section 1 can certainly be reasonably interpreted as empowering the general chairman or, in his absence, the general secretary, to take action such as was taken in this case. You are frequently confronted with situations where the members of the general committee are at sea at the time a particular problem arises; they are out sail-

Argument on Behalf of the Respondent Union.

ing ships, and to have permitted this matter to have rested until the general committee could be consulted first, would, in effect, permit the action—certain conduct to take place which it would be impossible to remedy thereafter.

• • • • •

There are other provisions in the constitution and by-laws that generally carry with it and connote and clearly imply the same sense and the same reasoning. Thus, for example, there is a provision in Article 9, Section 12—and I am not [499] making my reference to these provisions all-inclusive, I am merely pointing up a few of them at this time—referring to Article 9, Section 12, there is a provision that when the general committee, due to various circumstances there outlined, such as illness, absence from the country or other reasons is unable to fulfill its responsibilities and duties as provided in Article 9, various sections, such responsibility and duties devolve upon the general chairman and the general secretary-treasurer.

• • • • •

General Counsel's Exhibit 8.

Pier 8 S. I.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To: Willard C. Fowler

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Raphael Semmes

Operated by Waterman Steamship Co.
19 Rector Street, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify
The Radio Officers' Union by telephone or telegraph before
quitting my ship in any United States port. I agree to do
my utmost to see that none but a member of my union in
good standing relieves me when I leave my ship.

W. C. FOWLER

(Name of Radio Officer)

General Counsel's Exhibit 10.

OFFICIAL CLEARANCE

issued by

THE RADIO OFFICERS' UNION
1440 Broadway, New York, N. Y.
Phones: LACKAWANNA 4-5022 — 4-5093

To Henry S. Miller

(Name of Radio Officer)

You are hereby assigned as only Radio Officer
S.S. Frances

General Counsel's Exhibit 11.

Before going to the ship or to the steamship company's office, report to:

[If Mr. Frey is not in office,
contact Mr. Harold Kussmaul,
Assistant to Captain Respes]

Report immediately, or at New York 9:30 AM
(Time or date)

To A. H. Bull & Co.

(Name of Steamship Company)

115 Broad Street, New York

(Address of Steamship Company)

Attention Mr. Frey

This is a Permanent assignment

(Temporary or permanent)

Date issued March 1, 1948

Time issued 3:35 PM

FRED M. HOWE

Dispatcher

General Counsel's Exhibit 11.

OFFICIAL CLEARANCE

issued by

THE RADIO OFFICERS' UNION

1440 Broadway, New York, N. Y.

Phones: LACKAWANNA 4-5022 — 4-5093

To Frank Paese

(Name of Radio Officer)

You are hereby assigned as only Radio Officer
S.S. Evelyn

General Counsel's Exhibit 11.

Before going to the ship or to the steamship company's office, report to:

Take IRT downtown local to
South Ferry, then walk along South
Street until you come to Broad
Street, turn to left and walk to
No. 115 BROAD STREET

Report immediately, or at 10:30 A. M.

(Time or date)

To A. H. Bull & Co.

(Name of Steamship Company)

115 Broad Street, New York

(Address of Steamship Company)

Attention Captain Respass or Mr. Kaussmaul

This is a Permanent assignment

(Temporary or permanent)

Date issued April 27, 1948

Time issued 10:30 AM

Dispatcher

FRED M. HOWE

General Counsel's Exhibit 12

(L e t t e r)

THE RADIO OFFICERS' UNION
C. T. U.—A.F. of L.

June 22, 1948.

Mr. Charles T. Douds, Regional Director,
National Labor Relations Board,
2 Park Avenue,
New York, 16, N. Y.

RE: Case No. 2-CB-91
A. H. Bull Steamship Company
Willard Christian Fowler

Dear Sir:

This will acknowledge receipt of your letter dated June 18, 1948 and copy of Charge in the above-entitled case. Our reply to the Charge follows:

On or about December 29, 1947, Alexander Kozel, member of The Radio Officers' Union, was assigned as Radio Officer to the S. S. FRANCES, operated by A. H. Bull Steamship Company. The assignment was made at New Orleans, La. by Kenneth J. Wright, our New Orleans Representative. The assignment was made as a permanent one, and Mr. Kozel accepted the position as a permanent one.

Upon arrival of the vessel in New York on or about February 27, 1948, Mr. Kozel was informed by Robert H. Frey, Radio Supervisor of the A. H. Bull Steamship Company, that he (Mr. Kozel) might be obliged to relinquish his job due to the Company's anticipating the arrival of another Radio Officer from Miami, Florida.

Mr. Kozel came to my office and protested being discharged to make way for another man. Mr. Kozel informed me that the Captain of the vessel had expressed a desire that Mr. Kozel continue aboard the ship as Radio Officer.

General Counsel's Exhibit 12.

Neither the Captain of the vessel nor the Company made an protest to the Union, either written or verbal, that Mr. Kozel was unsatisfactory, either at the time of the incident, prior thereto, or afterwards. We felt that as long as Mr. Kozel's work was satisfactory and as he had been hired as a permanent employee, he should not be discharged. Our agreement with the Company makes no provision for the discharge of a Radio Officer, except for cause. We, thereupon, registered our protest with the Company against Mr. Kozel's discharge.

At that time, Mr. Fowler had not applied to the Union for a clearance to take the job in question in accordance with the usual practice and in accordance with provisions of our agreement with the Company. When it was brought to the attention of the Union that Mr. Fowler had gone aboard S. S. FRANCES, an appropriate telegram was sent to him. Mr. Fowler, thereupon, called at the Union office and apologized for having gone aboard without a clearance and stated to me that he had had no knowledge that by taking the position he would be displacing another member of the Union. He also stated to me at the time that had he known that he was to displace another men, he would not have come to New York.

During his visit to this office, I informed Mr. Fowler that he could very quickly obtain another ship through the Union's hiring facilities. However, Mr. Fowler said that he had some work to do in Miami and would return home for a period. He also stated that he would return to New York at a later date and ship out through the Union. To this, we agreed.

On or about April 26, 1948, Mr. Fowler returned to New York, called at the Union office, applied for an assignment, and was assigned as Radio Officer to S. S. RAPHALE SEMMES, operated by Waterman Steamship Corporation. This is a very fine type of ship, equal in all respects to any mer-

General Counsel's Exhibit 12.

chant vessel now in operation. The wage scale, overtime, and working conditions on this vessel were, and still are, identical to those on vessels operated by A. H. Bull Steamship Company.

Although the Waterman Steamship Corporation agreed to hire Mr. Fowler, he (Mr. Fowler), declined to accept the job. He called me on the telephone and said he had decided not to accept for the reason that he had gone on board the vessel and talked to some of the crew members, or Officers, and concluded that he "wouldn't like the ship or the set-up."

I have no record that Mr. Fowler came to this office on or about April 26, 1948 for a "clearance" for any vessel operated by A. H. Bull Steamship Company; neither do I have any recollection that any official of the A. H. Bull Steamship Company called at this office in person, telephoned, or wrote to the Union requesting that Mr. Fowler be "cleared" for any of the Company's vessels.

Mr. Fowler has been a member of the Union since November 9, 1942 and his dues are paid up and he is in good standing.

If you require further information from us concerning this matter, I shall be pleased to cooperate with your office to the best of my ability.

Very respectfully yours,

FRED M. HOWE,
General Secretary-treasurer.

General Counsel's Exhibit 14

* * * * *

ARTICLE 6—OFFICERS

- Sec. 1 The administrative officers of the ROU shall be a General Chairman, a General Committee composed of two members for every port or district where the Union maintains an office, and a General Secretary-treasurer.

* * * * *

ARTICLE 7—GENERAL CHAIRMAN

- Sec. 1 The General Chairman, as titular head of the ROU shall see that the Constitution of the CTU, the By-laws, contracts and agreements of the ROU are strictly enforced and adhered to and shall call to account any officer or member violating these laws, contracts or agreements.

* * * * *

- Sec. 6 The General Chairman shall interpret the by-laws of the ROU, and the CTU Constitution on behalf of the ROU, with final decision resting with the International President of the CTU.

* * * * *

- Sec. 8 The General Chairman shall perform such other duties as are otherwise provided for in these by-laws and the CTU Constitution.

* * * * *

ARTICLE 8—GENERAL SECRETARY-TREASURER

- Sec. 9 The General Secretary-Treasurer shall act in the capacity of General Chairman in all absences of the General Chairman.

* * * * *

General Counsel's Exhibit 14.

ARTICLE 9—GENERAL COMMITTEE

Sec. 1 The General Committee of the ROU shall be composed of two members for every port or district where the Union maintains an office. Six members of the General Committee shall constitute a quorum at any meeting.

Sec. 2 The General Committee shall provide a guardianship over the properties affairs and activities of the ROU and shall ensure that the principles and policies upon which the ROU was founded are continued and extended so as to redound to the benefit and best interest of the membership of the ROU.

* * * * *

Sec. 6 The General Committee shall undertake to settle all grievances appealed to it or placed before it by any member or officer of the ROU after a proper officer of the ROU is unable to settle such grievance, before further appeal is taken by the member or officer under Article 28 of the CTU Constitution.

* * * * *

Sec. 12 When the General Committee, due to the exigencies of war, illness, absence from the country, or for other reasons, is unable to fulfill its responsibilities and duties as provided for in Article 9, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, such responsibilities and duties shall devolve upon the General Chairman and the General Secretary-treasurer, and shall be carried out by them in accordance with the Constitution and By-laws until such time as the General Committee is capable of functioning.

* * * * *

Respondent's Exhibit 2.

ARTICLE 19—ASSIGNMENTS

* * * * *

Sec. 3 In each locality where the ROU maintains an office or Representative, assignment rules for that locality may be laid down by membership meetings in that locality but such rules to become effective, must be approved by the General Committee and a second membership meeting in that locality.

* * * * *

Respondent's Exhibit 2

ARTICLE I—EMPLOYMENT

* * * * *

SECTION 2. When a member of the Union in good standing qualified to fill the vacancy cannot join the vessel in ample time to prevent a delay in her scheduled departure, then members of the Union in good standing shall be deemed unavailable, in which event employment for such position will be without regard to Union affiliation for that voyage only.

* * * * *

SECTION 5. Radio Officers may be transferred from one vessel to another and nothing contained in this Agreement shall be construed as requiring the discharge of any presently employed Radio Officer who, in the opinion of the Company, is satisfactory, or to prevent the discharge of any Radio Officer who, in the opinion of the Company, is not satisfactory, provided, however, that if the Union feels that any discharge is discriminatory, it shall be dealt with as a grievance and provided further, that such discharge shall not interfere with or delay the dispatch of any vessel on her scheduled departure from any port.

* * * * *

Respondent's Exhibit 2.

ARTICLE V—GRIEVANCES

* * * * *

In the event the Radio Officers and Master or Company representative cannot settle any grievance arising under the terms of this Agreement or any alleged violation of any part of this Agreement or the interpretation of any clause of this Agreement, it shall be dealt with between authorized representatives of the Union and representatives of the Company. Before any matter is referred to arbitration as provided for in Article VI hereof, a national officer of the Union and an executive of the Company, or his duly authorized representative, shall attempt to satisfactorily resolve the issue or issues.

ARTICLE VI—ARBITRATION

SECTION 1. Matters which are not satisfactorily settled as provided for in Article V hereof shall by written notice be referred to a board of arbitration which shall meet in the Port of New York or such other place as may be mutually agreed upon, and shall be composed of one representative appointed by the Company and one representative appointed by the Union. All appointments shall be made within forty-eight (48) hours, Sundays and holidays excluded, after receipt of written notice to arbitrate. In the event the board of two fails to reach a decision within three (3) working days after it goes into deliberation, then the board of two shall select a third member to act as chairman. If the board of two cannot agree upon a chairman then the Director of Conciliation, U. S. Department of Labor, shall designate an impartial chairman who shall be a "per diem" man. The decision of the board of two or the decision of a majority of the board of three shall be the decision of the board and shall be final and binding upon the Company, the Union, and the Radio Officers.

* * * * *

Respondent's Exhibit 2.

ARTICLE XXII

* * * * *
 SECTION 2. * * * The Union agrees that it will not uphold incompetency or improper conduct on the part of members serving on vessels operated by the Company.

MAIN OFFICE:
 1440 BROADWAY
 NEW YORK 18, N. Y.
 LAckawanna 4-5022—5093
 FRED M. HOWE, Gen. Secy.-Treas.

 R. O. U. OFFICES

Baltimore, Md.
 14 East Lexington Street
 ANDREW MACDONALD, Gen. Ch.
 Phone Plaza 6319

San Francisco, Calif.
 105 Market Street
 RALPH D. FINCH, Rep.
 Phone Sutter 4320

Boston, Mass.
 170 Summer Street
 STEPHEN E. DOUGLASS, Rep.
 Phone HUBbard 9566

Wilmington, Calif.
 108 East "C" Street
 ROBT. H. WILSON, Rep.
 Phone TER. 4-4812

AIRWAYS OFFICE
 37-46—82nd Street
 Jackson Heights L. I., N. Y.
 Phone HA 6-6847

New Orleans, La.
 Room 408 Baronne Bldg.
 KENNETH J. WRIGHT, Rep.
 Phone RAYmond 3692

Respondent's Exhibit 5.

April 26, 1948

(Cancelled)

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To: Willard C. Fowler

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Raphael Semmes

Operated by Waterman Steamship Co.
19 Rector Street, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify
The Radio Officers' Union by telephone or telegraph before
quitting my ship in any United States port. I agree to do
my utmost to see that none but a member of my union in
good standing relieves me when I leave my ship.

W. C. FOWLER

(Name of Radio Officer)

Respondent's Exhibit 6.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To Clinton R. Whitehurst

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Stony Point

Respondent's Exhibit 7.

Operated by Socony Vacuum Oil Co.

26 Broadway, N. Y. C.

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

C. R. WHITEHURST

(Name of Radio Officer)

Respondent's Exhibit 7.

THE RADIO OFFICERS' UNION

1440 Broadway

New York, N. Y.

To John I. Henry

(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.

Raphael Semmes

Operated by Waterman Steamship Corp.

19 Rector Street, New York

(Office or pier at which to report)

Assigned by Fred M. Howe

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do

Respondent's Exhibit 8.

my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

JOHN I. HENRY
(Name of Radio Officer)

Respondent's Exhibit 8.

THE RADIO OFFICERS' UNION
1440 Broadway
New York, N. Y.

To Harold R. Tobias
(Name of Radio Officer)

You are hereby assigned as Radio Officer to S.S.
Fort Maultrie

Operated by Mathiesen's Tanker Industries

Todd's Erie Basin, Brooklyn

(Office or pier at which to report)

Assigned by Joseph P. Glynn

In accepting this assignment I hereby agree to notify The Radio Officers' Union by telephone or telegraph before quitting my ship in any United States port. I agree to do my utmost to see that none but a member of my union in good standing relieves me when I leave my ship.

HAROLD R. TOBIAS
(Name of Radio Officer)

BLEED THROUGH- POOR COPY

[fol. 78] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, OCTOBER TERM, 1951

No. 158

Argued February 7, 1952 Decided May 6, 1952

Docket No. 22191

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRA-
PHERS UNION, AFL, Respondent

Before: Swan, Chief Judge, L. Hand and Clark, Circuit
Judges

Petition of National Labor Relations Board for enforce-
ment of its order of April 18, 1951, directing the respondent
union to cease and desist from certain unfair labor practices
and to take certain affirmative action. Petition granted.

George J. Bott, General Counsel, David P. Findling, Asso-
ciate General Counsel, A. Norman Somers, Assistant Gen-
eral Counsel, and Owsley Vose and Willis S. Ryza, At-
torneys, National Labor Relations Board, for Petitioner.

[fol. 79] Butler & Silverman, Attorneys for Respondent;
Abner H. Silverman, Emanuel Butler and Alexander C.
Russotto, of Counsel.

SWAN, Chief Judge:

This is a petition by the National Labor Relations Board
for enforcement of its order issued April 18, 1951 against
the respondent union, 93 N. L. R. B. No. 249. The order
found that the union had engaged in certain unfair labor
practices in violation of sections 8(b)(1)(A) and 8(b)(2)
of the National Labor Relations Act as amended, by causing
the A. H. Bull Steamship Company to discriminate against
William Christian Fowler, a ship's radio operator and a
member of the union, thereby causing Fowler to lose employ-
ment by the company on each of two occasions, namely,
February 28, 1948 and April 26, 1948. It ordered the union
to cease and desist from such unfair labor practices, and

affirmatively, to give notice that it withdraws objection to Fowler's employment by the company and to make Fowler whole for any loss he may have suffered by reason of the union's preventing his employment on the above mentioned two occasions.

The questions presented for decision are (1) whether the record supports the finding that the union refused Fowler "clearance" to work on the Bull Company's ships; (2) whether such refusal was permitted by the terms of the contract between the Bull Company and the union; (3) whether the union's purported suspension of Fowler's union membership in February 1948 was valid; and (4) whether the facts as found establish a violation of sections 8(b)(1) (A) and 8(b)(2).

The Board accepted the facts as found by the trial examiner. We also accept them. In so far as there was any [fol. 80] dispute as to the facts, the findings depend upon the credibility of witnesses, whom the trial examiner heard and saw. As we recently said in *N. L. R. B. v. Chautauqua Hardware Corp.*, 192 F. 2d 492, 494, "When an issue turns upon the credibility of witnesses, the Examiner's findings are especially entitled to be respected," citing *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 496. The record contains nothing which would justify holding the findings to be clearly erroneous; hence they are supported by "substantial evidence," as the statute requires. 29 U. S. C. A. § 160(e).

Briefly, the facts found by the examiner were as follows: Fowler, a ship's radio operator, joined the respondent union on July 1, 1942 and was a member in good standing in February and April, 1948. On February 24, Fowler received at his home in Miami, Florida, a telegram from the Bull Company, on whose ships he had previously worked, requesting him to "Proceed New York as soon as possible for position SS. Frances." Kozel, also a member of the union, had served as radio officer on the last voyage of the Frances and was discharged by Mr. Frey, the company's radio supervisor, on the termination of that voyage at New York. After Fowler arrived in New York in February 1948, the union refused to give him "clearance," i.e. a written statement of "good standing" in the union. This was because Mr. Howe, the general secretary of the union, be-

lieved that Fowler had pushed Kozel out of his job, although in fact Fowler had had nothing to do with Kozel's discharge. For lack of a "clearance" Fowler was not given employment on the Frances, and returned to his home in Florida. This was the February transaction.

On April 22, 1948 Fowler again came to New York and the next day informed Frey that he was available. He also talked with Howe who was willing to give him a job with [fol. 81] other shipping lines but not with the Bull Company. Howe told Fowler: "You will be given no clearance for any Bull Line ship. Frey has been talking too much to you down there and making a company stiff out of you. I am going to break it up right here and now." Frey testified that on April 26 he asked Howe for a clearance for Fowler on the S.S. Evelyn which was refused. Another union member was given the job. This was the April transaction.

At the time of the transactions above described a collective bargaining agreement was in effect between the union and the company.¹ The respondent contends that the agreement provided for a "hiring hall," the petitioner that it did not. If it was a hiring hall contract the union could select from among its members the one to be hired by the company; if it was not a hiring hall contract the privilege of initial selection was the company's, subject only to the employee being a union member "in good standing." The Board determined that the contract did not provide for a hiring hall. The correctness of this decision is the principal question before us. A majority of the court thinks it correct.

The pertinent provisions of the contract are printed in the margin.² By Section 1 the company agrees, when va-

¹ The agreement was signed on January 11, 1947 and was extended on August 16, 1947 for a period of one year. Consequently under section 102 of the Taft-Hartley Act, 61 Stat. 152, section 8(3) of the Wagner Act, 29 U. S. C. A. § 158(3), was applicable to it.

²

"Article I—Employment

Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agree-

[fol. 82] cancies occur, "to select * * * members of the Union in good standing, when available, * * * provided such members are in the opinion of the Company qualified to fill such vacancies." Section 3 provides that if no qualified member of the union is available, the company will, "before a non-member of the Union is hired" give the union an opportunity to furnish a radio officer with the license necessary for the position to be filled. Section 6 provides that

ment, provided such members are in the opinion of the Company qualified to fill such vacancies.

* * * * *

Section 3. When a member of the Union in good standing qualified to fill the vacancy is not available, the Company will notify the Union twenty-four (24) hours in advance before a non-member of the union is hired, and give the Union an opportunity to furnish without causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

* * * * *

Section 5. Radio Officers may be transferred from one vessel to another and nothing contained in this Agreement shall be construed as requiring the discharge of any presently employed Radio Officer who, in the opinion of the Company, is satisfactory, or to prevent the discharge of any Radio Officer who, in the opinion of the Company, is not satisfactory, provided, however, that if the Union feels that any discharge is discriminatory, it shall be dealt with as a grievance and provided further, that such discharge shall not interfere with or delay the dispatch of any vessel on her scheduled departure from any port.

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing."

the company "shall have the right of free selection" of its radio officers, and when a member of the union is "hired," the company must "take appropriate measures," to make sure that such member is "in good standing." If he is in good standing, the union agrees to give "the necessary clearance" for the position to which the radio officer "has been assigned"; and, if he is not, the union must so notify the company in writing. These provisions plainly give the company the right to select the man it desires to hire, and [fol. 83] require the union to grant "clearance" if the man the company wants is a member in good standing. Such procedure is not a "hiring hall" arrangement. Even if we regarded the contract as ambiguous, which we do not, the doubt must be resolved against the union. Hiring hall arrangements, like closed shop arrangements, are an exception to the general provisions in section 29 U. S. C. A. § 158(a) against employer discrimination, and "one seeking to come within the exception must clearly comply with its terms." *N. L. R. B. v. Don Juan, Inc.*, 2 Cir., 178 F. 2d 625, 627.

The union contends that, regardless of the terms of the contract, the uniform practice of the parties so modified them as to make the contract one for a hiring hall. The trial examiner found:

"Although the contract contained no reference to a hiring-hall arrangement, the companies generally requested the Respondent to furnish radio officers to fill vacancies. To meet these requests, the Respondent maintained a 'shipping list' of its unemployed members in the order of the termination of their last employment. When a request for a radio officer was received from a company, the Respondent offered the assignment and requisite clearance to those of its unemployed members who were waiting for assignments in the Respondent's office, in the order in which their names appeared on the 'shipping list' * * * While this appears to have been the general practice, Fred Howe, the Respondent's secretary-treasurer, testified that on some few occasions, companies have asked that particular radio officers be assigned to them. In some of these instances, the Respondent refused the requests; in other instances,

the Respondent honored the requests although, as Howe [fol. 84] put it, 'Some of the members don't think too much of that system.' "

Complaint is made that the union was restricted in its proof as to the practice of the parties under contract. But we can find in the record no exclusion of proffered evidence which would have added anything material to that which was summarized in the above quoted finding. We agree with the Board that such practice did not effect a surrender of the company's rights under the contract. In most instances the company may have found it more convenient to ask the union to send a man than to find one for itself, but a party to a contract does not lose clearly reserved rights merely by non-insistence upon them in every instance.³

The union contends that in any event the refusal to grant a clearance to Fowler in February cannot be made the basis of an unfair labor practice charge because Fowler was not then in good standing—an adequate reason under the contract for refusing clearance. Howe, the general secretary of the union, ruled that Fowler was not in good standing since he had "bumped" a fellow union man. The trial examiner and Board found that Howe had no authority to make such a ruling, and we agree. A member of the respondent could be suspended in two ways: by the General Chairman with the consent of the General Committee or by the General Chairman alone, after first warning the member to correct his dereliction. Even if Howe was acting as General Chairman under Article 7, §7 of the by-laws, [fol. 85] he neither obtained the consent of the General Committee nor gave warning to Fowler before suspending him, and therefore the attempted suspension was invalid. Nor are we persuaded by the respondent's argument that neither the Board nor this court can review a union officer's

³ *Walter Kidde & Co. v. Walton-Viking Co.*, 8 Cir., 153 F. 2d 988, 991-992, cert. den., 329 U. S. 715; *South Atlantic S. S. Co. v. N. L. R. B.*, 5 Cir., 116 F. 2d 480, 482, cert. den. 313 U. S. 582; *Dant & Russell, Inc. v. Grays Harbor Exportation Co.*, 9 Cir., 106 F. 2d 911, 912; *In re Chicago & E. I. Ry. Co.*, 7 Cir., 94 F. 2d 296, 299.

interpretation of his own powers. Such a holding would permit rights guaranteed by the Act to be brushed aside by the artful drafting and interpretation of union constitutions and by-laws. Where those rights are concerned, there is as much reason to review the grounds for the suspension of a union member as to review an employer's asserted reasons for discharging an employee.

We think it clear that the union violated section 8(b)(1)(A) of the Act, 29 U. S. C. A. §158(b)(1)(A), by "coercing" Fowler "in the exercise of the rights guaranteed in section 7." Among those rights is the freedom to refrain from taking part in the "concerted activities" of a union. The concerted activity in the case at bar was refusal to take employment with the company as a means of reprisal against it for discharging Kozel. Fowler's privilege of refraining from concerted activities was limited only to the extent of requiring membership in a labor organization as a condition of employment. The attempt to suspend him from union membership and the refusal of a clearance were economic coercion in its most effective form. *Cf. N. L. R. B. v. Newman*, 2 Cir., 187 F. 2d 488, enforcing 85 NLRB 725, 730. The union's closed shop contract did not protect it because Fowler was in good standing as a member of the union. Before the union could deprive him of this status, it was obliged to adopt the disciplinary procedure provided in its constitution and by-laws. Consequently he was free to refrain from taking part in the union's concerted activity. *Cf. Union Starch & Refining Co. v. N. L. R. B.*, 7 Cir., 186 F. 2d 1008, 1011, cert. den. 342 [fol. 86] U. S. 815; *Colonie Fibre Co. v. N. L. R. B.*, 2 Cir., 163 F. 2d 65, 68-70.

The refusal to grant Fowler clearance although he complied with the only condition of employment—union membership in good standing—was also a violation of section 8(b)(2) of the Act, 29 U. S. C. A. §158(b)(2), by inducing a violation of section 8(a)(3), 29 U. S. C. A. §158(a)(3). Refusal of clearance caused the company to discriminate against Fowler in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union. No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers v. N. L. R. B.*,

2 Cir., 181 F. 2d 34, 38, aff'd 341 U. S. 694. Whether the union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers such as Kozel, is immaterial, although its failure to invoke the grievance procedure of Article I, section 5 of the contract and its precipitate and invalid suspension of Fowler seem hardly consistent with such motive. And in the April transaction it refused to allow the company to employ him on any of its ships. Such conduct displayed to all non-members the union's power and the strong measure it was prepared to take to protect union members. Cf. *Colonie Fibre Co. v. N. L. R. B.*, 2 Cir., 163 F. 2d 65, 68, 69.

The union assigns a number of other errors which we find unsubstantial. The amendment of the complaint to include the February incident was properly granted and respondent obtained a recess to prepare his case. Respondent also argues that Fowler could not seek the Board's aid without first utilizing the grievance and review procedure in the contract and the union constitution and by-laws. But the Board here is asserting a public right, not Fowler's personal right, and the Board's power is not dependent on the availability of other means of adjustment. See §10(a) of the Act; *National Labor Relations Board v. Newark Morning Ledger Co.*, 3 Cir., 120 F. 2d 262, 268, cert. den. 314 U. S. 693. Nor was there error in failing to join the company as a respondent in this proceeding. A finding that the union has violated §8(b)(2) can be made without joining the employer and finding a §8(a)(3) violation. See *National Labor Relations Board v. Newspaper & Mail Deliverers' Union*, 2 Cir., 192 F. 2d 654, 656; *National Union of Marine Cooks and Stewards, C. I. O. (George C. Quinley)*, 92 NLRB 877. Nor do we find the Board's back pay provision improper. The way is still open to determine, in the compliance proceedings the effect of Fowler's refusal to work on other ships.

The petition for enforcement is granted.

CLARK, Circuit Judge (dissenting):

I dissent from the grant of enforcement on the grounds persuasively stated by Board Member Murdock in dissenting below, 93 N. L. R. B. No. 249. (Board Member Reynolds also dissented as to the Board's ruling on the February incident, limiting "his finding of discrimination to the Respondent's failure to clear Fowler in April when his good standing had been restored.") Mr. Murdock first says:

"The majority of my colleagues and the Trial Examiner found the facts in this case, briefly stated, to be as follows. On February 27, 1948, complainant Fowler was offered a position as radio officer by the Bull Steamship line on its ship, the *S. S. Frances*. Fowler was, at this time, a member in good standing of the Respondent. In order that a vacancy in the position of radio officer on the *Frances* might exist, however, it was necessary for the company to dis-[fol. 88] charge another member of the Respondent who was currently employed in that job.¹ Upon complaint of the displaced member, Howe, the secretary-treasurer of the Respondent thereupon suspended Fowler for 'bumping' another member and a subsequent request by the Company for clearance of Fowler for the position was denied by the Respondent. The suspension of Fowler was later lifted, but, when on April 26, the Company again offered Fowler employment as a radio officer on its vessel, the *S. S. Evelyn*, clearance was once more refused by Respondent. As a

¹ So I think the opinion is in clear error in first indicating that Kozel was discharged for some unspecified reason and then stating, "although in fact Fowler had nothing to do with Kozel's discharge," as a rebuttal of the union secretary's belief "that Fowler had pushed Kozel out of his job." There are no such findings in the record, and the Trial Examiner's recital of those findings which were made "upon uncontradicted evidence" is to the contrary. Thus at the end of the "*Frances*'" voyage in February, Frey, the company's radio supervisor, "told Kozel that although his services had been satisfactory, he was to be replaced by 'a man with senior service in the company.'" So elsewhere the Examiner speaks of "Kozel, a member of the Respondent, whom Fowler was to replace."

consequence of the refusal to grant the clearances, the positions, in both instances were filled by other members of the Respondent. Admittedly, in both instances, negotiations for employment of Fowler were carried on by the latter and the Company without reference to the Respondent other than the requests for clearance. The Respondent therefore contends that its actions were in accord with, and protected by, the terms of its contract with the Company and the 'hiring hall' operated in conjunction with that agreement. I find the Respondent's argument persuasive."

He then continues (omitting some footnote references and explanations):

"There seems no question that, if the contract between the Respondent and the Company during the period con-[fol. 89] cerned herein provided for employment of radio officers only through a union hiring hall, the denial of the clearances by the Respondent was both justified and protected under the terms of the amended Act. My disagreement with my colleagues, accordingly, centers upon the question of the existence of a hiring hall provision in that agreement. The record is clear, and indeed the Trial Examiner finds, that the various steamship companies, including the Bull line, who were parties to the contract, 'generally requested the Respondent to furnish radio officers to fill vacancies.' Further, 'to meet these requests, the Respondent maintained a "shipping list" of its unemployed members in the order of the termination of their last employment' and when a vacancy occurred, it was filled by offering the assignment and the requisite clearance to members of the Respondent on the shipping list in the order occurring there. Despite this clear showing of the existence and operation of a hiring hall, however, the Trial Examiner and the majority opinion contend such an arrangement is without provision in the contract between the parties and is thus unavailable to the Respondent as a defense. This conclusion, in direct contradiction of the established facts, is reached in view of a purported lack of a clear hiring hall provision in the agreement, the reservation of the right of 'free selection' of employees by the companies, and the inclusion of a clause providing for written notice by the

Union where a selected member was not in good standing. I cannot agree.

"The pertinent portions of the contract, as set forth in the Trial Examiner's Report, do not, by name refer to the establishment of a hiring hall for the employment of radio officers. To this extent the argument of the majority is well taken. In its previous decisions dealing with 'hiring halls' in the maritime industry, however, the Board has [fol. 90] never made such a condition prerequisite to finding the existence of such systems, and has, indeed, recognized the existence of hiring halls where the contracts did not establish them in name. Nor does the reservation of a right of free selection by the companies necessarily controvert the existence of a hiring hall. While the inclusion of this clause, as argued by the Trial Examiner and the majority of the Board, conceivably negates the inference that a hiring hall was created by the contract, it is equally interpretable as merely protecting the right of the companies to reject unsuitable applicants for radio officer positions.

As the Trial Examiner, at the hearing, excluded oral evidence as to the meaning of this term, among others, as interpreted by the parties, the precise effect of the language cannot be determined. On the other hand, the incontrovertible fact is that such 'free selection' considered granted in the contract by my colleagues, was never utilized by the companies to that effect, nor was there any attempt to do so. Its abstract existence is accordingly rebutted by the realities of the factual situation before us. Furthermore, the requirement of 'clearance' by the Respondent, a term the parties clearly indicated to be of special weight, before a free selection of applicants could be effected, is incompatible with the meaning attributed to the latter clause by the majority opinion. Finally, the reasoning of my colleagues that no occasion for written notice by the Respondent that any particular employee was not in good standing would arise unless the Company hired radio officers directly, misreads the clause in question.²

² Mr. Murdock's footnote here reads as follows: "This clause does not refer to hiring alone, but also contemplates action taken in transferring or promoting employees. In these instances, it is clear, there would be ample reason

[fol.91] "Upon the entire record, and in view of the foregoing, I am persuaded and would find that a lawful hiring hall was established by the contract in question. Accordingly, as the actions of the Respondent herein were in accord with that contract, I would dismiss the complaint in its entirety."

His final statement is an argument that even if the contract were to be otherwise construed, the Respondent was not guilty of infringement of the Act with respect to the refusal to clear Fowler on February 27, because there was no clear showing beyond mere supposition that it had not complied with or had ignored its own rules of procedure. There was "a complete lack of protest by Fowler" at that time and reliance upon this ground forces the Board "into the new and untenable position of becoming the arbiter of proper observance of intraunion procedure."

Quite generally in labor disputes we see some indications of a history and an impact of personalities, surroundings, and local conditions, which, however, are at best only imperfectly translatable to the formal record. Because of this I have wished to trust as much as possible to not only the Board's greater "expertise" in the circumstances, but also its intuitive appreciation of the impelling force of the local background with which we are not acquainted. Here one senses that more background even than usual remains undisclosed, and our understanding of the case by that becomes the more unstable. The proceeding appears atypical; in what are apparently settled and peaceful union relations, the independent worker who attempts to go on his own to secure better individual treatment at the expense of union principles is given the green light by the

for written notice by the Respondent if the recipient of the transfer or promotion was not in good standing. There is, therefore, no reason for assuming that the provision is inconsistent with a hiring hall. Moreover, as the majority opinion admits, the Trial Examiner's conclusion that no occasion for a twenty-four hour notice to the Respondent before the companies hired non-members would arise until, and unless, the companies had first directly and unsuccessfully sought to hire members of the Respondent is clearly erroneous."

[fol. 92] Board for reasons I should think not merely legally inadequate, but also practically inimical to the advancement of peace on this labor front. Perhaps there is some good reason for this; I wish I knew. But on the present record I am constrained to conclude that enforcement should not be had of this Board order.

[fol. 93] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 22191

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, Respondent

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Swan, Chief Judge, L. Hand and Clark, Circuit
Judges

This cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated April 18, 1951. The Court heard argument of respective counsel on February 6, 1952, and has considered the briefs and the transcript of record filed in this cause. On May 6, 1952, the Court, being fully advised in the premises, handed down its decision enforcing the Board's said Order. In conformity therewith, it is hereby

Ordered, adjudged and decreed that the Respondent, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, and its agents shall: 1. Cease and desist from:

(a) Causing or attempting to cause A. H. Bull Steamship Company, its successors and assigns, to discriminate against Willard Christian Fowler or any other employee in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended;

(b) Restraining or coercing employees or prospective employees of A. H. Bull Steamship Company, its successors and assigns, in the exercise of their right to refrain from any or all of the concerted activities listed in Section 7 of the National Labor Relations Act, except to the extent that such right may be affected by the proviso to Section 8 (b) (1) (A), or by an agreement requiring membership in the Respondent as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act. [fol. 94] 2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Notify A. H. Bull Steamship Company in writing that it withdraws any objection to the employment of Willard Christian Fowler and requests it to offer him immediate employment;

(b) Notify Willard Christian Fowler that it has advised A. H. Bull Steamship Company that it withdraws its objection to his employment and requests it to offer him immediate employment;

(c) Make whole Willard Christian Fowler in the manner set forth in the section of Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated July 24, 1950, entitled "The Remedy";

(d) Post at its office in New York City copies of the notice attached hereto and marked "Appendix A". Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Second Region (New York, New York), shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(e) Mail to the aforesaid Regional Director for the Second Region signed copies of the notice attached hereto as "Appendix A" for posting, the Employer willing, at the office and docks of A. H. Bull Steamship Company, in places where notices to employees are customarily posted.

Copies of said notice, to be furnished by the said Regional Director for the Second Region, shall, after being signed as provided in paragraph 2.(d) above, be forthwith returned to said Regional Director for said posting;
 [fol. 95] (f) Notify the said Regional Director for the Second Region in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

Learned Hand, Judge, United States Court of Appeals for the Second Circuit; Thomas W. Swan, Judge, United States Court of Appeals for the Second Circuit.

Filed: May 22, 1952.

[fol. 96]

APPENDIX A

NOTICE

TO ALL MEMBERS OF THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, AND TO ALL EMPLOYEES AND PROSPECTIVE EMPLOYEES OF THE A. H. BULL STEAMSHIP COMPANY

PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause A. H. Bull Steamship Company or its successors and assigns, to discriminate against Willard Christian Fowler or any other employee or prospective employee in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees or prospective employees of the A. H. Bull Steamship Company, its successors or assigns, in their exercise of the right to refrain from any or all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso

in Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will notify in writing the A. H. Bull Steamship Company that we withdraw our objections to the employment by it of Willard Christian Fowler and request it to offer him employment as a radio officer.

We Will notify Willard Christian Fowler that we have advised A. H. Bull Steamship Company that we withdraw our objections to his employment and that we request it to offer him employment as a radio officer.

We Will make Willard Christian Fowler whole for any loss of pay suffered by him as the result of our having prevented his hire by A. H. Bull Steamship Company.

The Radio Officers' Union of the Commercial Telegraphers Union, AFL (Union); By — —
(Representative) (Title).

Dated ———.

This notice must remain posted for sixty (60) days from the date of posting and must not be altered, defaced, or covered by any other material.

[fol. 97] [Endorsed:] United States Court of Appeals, Second Circuit. Filed May 22, 1952. Alexander M. Bell, Clerk.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

(2732)

[fols. 94-97] SUPREME COURT OF THE UNITED STATES—
OCTOBER TERM, 1952

No. —

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELE-
GRAPHERS' UNION, AFL, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ORDER STAYING JUDGMENT—June 30, 1952

Upon consideration of the application of counsel for the petitioner,

It is ordered that execution and enforcement of the judgment of the United States Court of Appeals for the Second Circuit be, and the same is hereby, stayed pending the filing and disposition of a petition for writ of certiorari, provided same is filed on or before July 31, 1952.

In the event the petition is filed within the time specified and is granted, then this stay is to continue in effect until the mandate of this Court issues.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 30th day of June, 1952.

[fol. 98] SUPREME COURT OF THE UNITED STATES—OCTOBER
TERM, 1952

[Title omitted]

No. 230

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5142)

FILE COPY

Office - Supreme Court, U. S.
FILED

JUL 28 1952

CHARLES ELMORE CROFTON
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM—1952

No. 230. 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT AND SUPPORTING BRIEF

✓ ABNER H. SILVERMAN,
✓ EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, New York,

✓ HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.,

Counsel for Petitioners.

BLEED THROUGH- POOR COPY

INDEX

	PAGE
Petition:	
History of the Case and Opinions Below	2
Summary Statement of Matters Involved	3
Jurisdiction	7
Questions Presented	7
Reasons for Granting the Petition	7
Conclusion	9
Appendix	10
Brief:	
POINT I—The failure to join the employer as a party to the proceeding constituted fatal error	16
POINT II—The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that <i>International Brother-</i> <i>hood of Electrical Workers v. N. L. R. B.</i> , 341 U. S. 694, warranted such deprivation	20
POINT III—There was no valid basis for the find- ing made in this case that the Union's conduct would or did "encourage membership"	21
POINT IV—The Court below erred in judging the Union's rights and obligations by the applica- tion of a strict construction of the language of the contract, rather than the actual practices and interpretation thereof by the parties	24
Conclusion	27

CASES CITED

	PAGE
Boilermakers AFL (Consolidated Western Steel Corporation), 94 N. L. R. B. 1590	26
Colgate Palmolive Peet Co. v. N. L. R. B., 338 U. S. 355	16
International Brotherhood of Electrical Workers v. N. L. R. B., 341 U. S. 694	3, 8, 20
N. L. R. B. v. Don Juan, Inc. (C. A. 2), 178 F. (2nd) 625, 627	25
N. L. R. B. v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685, 695	25
N. L. R. B. v. Gaynor News Inc. (not yet officially reported)	24
N. L. R. B. v. Herald Tribune, 93 N. L. R. B. 419	17
N. L. R. B. v. Mason Manufacturing Co. (C. A. 9), 126 F. (2nd) 810, 813	25
N. L. R. B. v. National Broadcasting Co. (C. A. 2) 150 F. (2) 895, 900	18
N. L. R. B. v. Newspaper and Mail Deliverers Union (C. A. 2), 192 F. (2nd) 654	17, 18
N. L. R. B. v. Newman, 85 N. L. R. B. 725, enforced (C. A. 2), 187 F. (2d) 488	3, 8, 17
N. L. R. B. v. Reliable Newspaper Delivery Inc. (3rd Cir.), 187 F. (2) 547	23
N. L. R. B. v. Scientific Nutrition Company (C. A. 9), 180 F. 2nd 447	25
N. L. R. B. v. Teamsters Union, 196 F. (2) 1	22
N. L. R. B. v. Webb Construction Company (8th Cir.), 30 L. R. R. M. 2125, decided May 8, 1952	23
Port Chester Electrical Construction Corp., 97 N. L. R. B. No. 59	26
Union Starch & Refining Company v. N. L. R. B. (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815	17, 18, 19

STATUTES CITED

PAGE

National Labor Relations Act (Act of
July 5, 1935, c. 372, 49 Stat. 449, 29
U. S. C., Secs. 151, *et seq.*):

Sec 8 (3) 10

National Labor Relations Act, as
amended (61 Stat. 136, 29 U. S. C.
Supp. IV, Secs. 151, *et seq.*):

Sec. 7 11

Sec. 8 (a) (3) 11

Sec. 8 (b) (1 and 2) 12

Sec. 10 (a), (c), (e) 13

Sec. 102 14

BLEED THROUGH- POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM—1952

No.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Radio Officers' Union of the Commercial Telegraphers Union, AFL, hereinafter referred to as the Union, respectfully prays that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Second Circuit, entered May 20, 1952, enforcing an order of the National Labor Relations Board, issued April 18, 1951, in a proceeding instituted against the Union pursuant to Section 10 (e) of the Labor Management Relations Act of 1947, hereinafter referred to as the Act (61 Stat. 136, 29 U. S. C. Supp. IV, Section 151, *et seq.*).

History of the Case and Opinions Below

This cause came before the United States Court of Appeals for the Second Circuit (hereinafter referred to as the Court below) upon a petition of the National Labor Relations Board (hereinafter called the Board) for enforcement of its order issued April 18, 1951 (B. A. 1-5).*

The order followed the filing of charges by William Christian Fowler, (hereinafter called "Fowler"), upon which the Board issued its complaint. The complaint issued only after the General Counsel to the Board had overruled the determination of the Board's Regional Director that no complaint should issue on the basis of the facts disclosed by his investigation of the charge (R. A. 2).**

The Board's order, adopted with modifications the findings and conclusions of the Trial Examiner which found the Union guilty of violations of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act. Board Member Murdock dissented *in toto*, and Board Member Reynolds dissented in part (B. A. 22-37). The Board's decision is reported at 93 N. L. R. B. 249.

By a divided Court, the Court below decreed enforcement of the Board's order. The majority opinion written by Judge Swan and concurred in by Judge Learned Hand, and the dissenting opinion of Judge Clark are appended to the record (R. A. 78-90). They are not yet officially reported.

The decision of the Court below will remain final unless jurisdiction is taken by this Court.

* "B. A." refers to Board's Appendix.

** "R. A." refers to Respondent's Appendix.

Summary Statement of Matters Involved

This case presents:

1. The refusal of the Court of Appeals to disapprove the failure of the National Labor Relations Board to join both employer and union as parties to a cause involving a simultaneous violation of 8 (b) (2) and 8 (a) (3) as required by the rule enunciated in the case of *N. L. R. B. v. Newman*, 85 N. L. R. B. 725, enforced (C. A. 2) 187 F. (2) 488; and the refusal of the Court below to recognize the impropriety of incorporating a back pay provision in a decree which contains no reinstatement provision, thus contravening Section 10 (c) of the Act.

2. The refusal of the Court of Appeals to give effect to the rights of free speech preserved by Section 8 (c) of the Taft-Hartley Act, and the refusal of the Court below to distinguish between an 8 (b) (2) case and an 8 (b) (4) (A) case in applying the doctrine enunciated by this Court in *International Brotherhood of Electrical Workers v. N. L. R. B.*, 341 U. S. 694 pertaining to Section 8 (c).

3. The refusal of the Court of Appeals to follow decisions of the Third, Seventh, Eighth and Ninth Circuits which require a showing that discrimination had the purpose and effect of "encouraging membership"; and the adoption by the Second Circuit of the theory of "inherent encouragement" which has been repudiated in the other Circuits (*infra*, pp. 22-24).

4. The refusal of the Court of Appeals to give effect to a valid Union security agreement, asserted as a defense, on the basis of a strict construction of the language of the contract, in disregard of clear proof as to the understanding and practices of the parties thereunder.

Most briefly summarized, the facts are:

As exclusive bargaining representative of the radio officers employed by 24 named steamship companies, including the Bull Steamship Company (hereinafter called the "Company"), the Union and said companies executed a standard collective bargaining agreement on January 11, 1947, covering the Company's radio officers. After the enactment of the Taft-Hartley Act, but prior to its effective date, the Union and the Company, on August 16, 1947, extended the term of the agreement until August 15, 1948.¹ The pertinent provisions of the collective bargaining agreement with respect to the employment of radio officers, are set forth in the opinion of the Court below (R. A. 80-81).

It is undisputed that, in actual operation, the employment procedure which had been generally followed by the parties to the agreement prior to the extension of the term of the agreement was that of a typical union hiring hall arrangement, *i. e.*, the Companies under contract with the Union requested the Union to furnish radio officers to fill vacancies as they occurred. To meet these requests, the Union's rules and by-laws provided for the maintenance of a "shipping list" of its unemployed members arranged in the order of the termination of their last employment. When a request for a radio officer was received from a Company, the Union offered the assignment to those of its members who were seeking assignment, preference being given to the member longest unemployed. The member entitled thereto by the application of these rules was given "the necessary 'clearance'" (R. A. 82).

Fowler, a ship's radio officer, joined the Union on July 1, 1942, and was a member thereof in February and April of 1948.

¹ The validity of the contractual provisions theretofore in existence were thus preserved under Section 102 of the Act.

It has been found that on or about February 28, 1948, and on or about April 26, 1948, Fowler was offered employment directly by the Company, subject to his ability to obtain "the necessary 'clearance'" from the Union; that the Union refused to issue the necessary clearance; that the Company refused to hire Fowler without the clearance; that Fowler was thus deprived of the proffered employment (B. A. 58).

The Board found that the Union's refusal to issue the clearance to Fowler was motivated by its desire "to enforce against him as one of its members, the rules of fair dealing between its members it had prescribed for their mutual benefit" (B. A. 59). More specifically, that the Union refused clearance because (1) it wished to express its disapproval of the attempt to hire Fowler directly in circumvention of its hiring hall rules, and (2) because in the February incident, Fowler's hire by the Company would have caused the displacement of Kozel, another member of the Union, whose services had been admittedly satisfactory to the Company (B. A. 59).

Based on the foregoing facts, it has been found that the Union violated 8 (b) (2) and 8 (b) (1) (A) of the Act. The reasoning to support this finding runs thus: despite the rules of the Union and the practices of the parties to the contract, the language of the contract was such that it obligated the Union to issue a clearance to any member in good standing or, at any rate, did not clearly justify the Union's refusal to issue such clearance; the Union's refusal to issue clearance caused the Company to discriminate against Fowler in a manner violative of Section 8 (a) (3); hence, the Union was guilty of violating 8 (b) (2). Further, that in refusing clearance, the Union was attempting to compel Fowler to conform to the hiring hall practice above described, thus "coercing and restraining" him in the exercise of his right "to refrain from concerted activities" as guaranteed in Section 7 of the Act,

and that the Union thereby violated Section 8 (b) (1) (A) of the Act (B. A. 64-68).

Inter alia, the Union contended:

(1) that the failure of the Board to join the employer as a party to the proceeding was fatal to the proceeding because (a) such failure was in contravention of the basic purposes of the Act and the policies of the Board adopted in furtherance thereof; and (b) that in the absence of a reinstatement provision, rendered impossible by the failure to join the employer, the back pay provision of the decree (R. A. 91) contravenes Section 10 (c) of the Act;

(2) that the refusal of the Union to issue clearance, unaccompanied by any "threat of reprisal or force or promise of benefit" constituted an expression of its views which was within the protection of Section 8 (c) of the Act;

(3) that the Union's actions were not intended to and did not have the effect of "encouraging" Union membership;

(4) that the contract and the long standing practice of the parties justified the Union in applying to Fowler the same rules governing the orderly assignment of work that applied to all other members of the Union and constituted a valid defense to its allegedly discriminatory conduct.

All of these contentions were overruled by the Trial Examiner, the majority of the Board, and the majority of the Court below.²

² The Court below did leave open for determination in the compliance proceedings the question of the effect upon the back pay provision, of Fowler's refusal to accept comparable work on other ships (R. A. 85).

Jurisdiction

The jurisdiction of this Court to review the decree of the United States Court of Appeals is invoked under Section 10 (e) of the National Labor Relations Act and Section 1254 of the Judicial Code.

Questions Presented

1. Where it is charged that a Union violated 8 (b) (2) of the Act in that it caused an employer to violate 8 (a) (3) of the Act, (a) Is it proper for the Board to omit the employer as a party and proceed solely against the Union?; (b) Assuming that this may be done, does Section 10 (c) of the Act permit a back pay provision in the absence of a reinstatement direction?

2. Is a Union deprived of its right of free speech as guaranteed by Section 8 (c) when it is found guilty of violating Sections 8 (b) (2) and 8 (b) (1) (A), despite the fact that "no threat of reprisal or force or promise of benefit" is made?

3. May a finding that discrimination was practiced for the purpose of "encouraging membership" be predicated upon an assumption that discriminatory conduct constitutes "inherent" encouragement of membership?

4. Is the existence of a valid union security arrangement, actually practiced by the parties, unavailable as a defense unless evidenced by clear written language?

Reasons for Granting the Petition

The Court below has passed on several important questions affecting substantial rights under the Taft-Hartley Act. The decision rests upon a pronouncement by the Court below which encompasses several principles of law

of widespread application and significance in the administration of the Act. To reach its conclusion in the instant case, the Court below adopted a series of premises as to the law which find no support in the Act, or in judicial precedent. We believe this to be demonstrated in our brief.

Thus, the Court below, approved the action of the Board in omitting the employer as a party to this proceeding—where the facts were such that the Union could not be guilty of an 8 (b) (2) violation unless the employer were equally guilty of an 8 (a) (3) violation—and this, despite the fact that this constituted a clear and unquestioned departure from established Board policy as enunciated in *N. L. R. B. v. Newman, supra*, and consistently followed since. As one consequence thereof, the decree herein contravenes Section 10 (c) of the Act in that it contains a back pay provision despite the fact that no reinstatement provision is contained therein.

So too, relying upon *International Brotherhood of Electrical Workers v. N. L. R. B., supra*, the Court below opined that the Union's rights under 8 (c) of the Act were not infringed despite the absence of "any threat of reprisal or force or promise of benefit"; the Court below thus applied to the instant 8 (b) (2) case, the rules of law which this Court applied to a secondary boycott case; and in so holding, the Court below inexplicably ignored the distinction clearly pointed out by this Court in its opinion in *International Brotherhood of Electrical Workers v. N. L. R. B. (supra)*, between a violation of Section 8 (b) (4) (A) and a violation of Section 8 (b) (2).

So too, the Court below invoked the theory of "assumed" or "inherent" encouragement of Union membership and thus brought itself in direct conflict with decisions in the Third, Seventh, Eighth and Ninth Circuits, where this theory has been repudiated.

So too, in holding that the actual practice of the contracting parties must be disregarded in favor of a strict

construction of the language of the contract, the decision of the Court below is in direct conflict with decisions of the Ninth Circuit.

The profound effect of the application of the principles enunciated in this case to future cases arising under the Act is such that review of the same by this Court is fully warranted. The sharp differences of opinion evoked by this case in the Board and the Court below attest to the unsettled nature of the questions involved and indicate the immediate and future significance of these questions in the field of labor relations. These questions should be settled by this Court.

Conclusion

WHEREFORE, petitioner respectfully prays that a writ of certiorari may be issued out and under the seal of this Court directed to the United States Court of Appeals, Second Circuit, to the end that the order and judgment of the said United States Court of Appeals in this case be reviewed and reversed and for such other and further relief as may be just and proper.

Dated July 23, 1952.

Respectfully submitted,

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, New York,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.,

Counsel for Petitioners.

Appendix

Statutes Involved

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. It shall be an unfair labor practice for an employer—

.

((3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

Appendix.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and

Appendix.

(ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment or grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some

Appendix.

ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a). The Board is empowered, as herein-after provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of ap-

Appendix.

peals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this

Appendix.

Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

IN THE
Supreme Court of the United States

OCTOBER TERM—1952

No.

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error.

The finding that the Union in the instant case violated Section 8 (b) (2) is predicated on the finding that it caused the employer to engage in conduct which was violative of Section 8 (a) (3).³

³ The Union's contention that the employer's conduct was not violative of 8 (a) (3) under the rule enunciated in *Colgate Palmolive Peet Co. v. N. L. R. B.*, 338 U. S. 355, and that hence the Union was not guilty of violating 8 (b) (2) was overruled.

It is thus apparent that if the union was guilty of violating 8 (b) (2) the Company was equally guilty of violating 8 (a) (3). *N. L. R. B. v. Herald Tribune*, 93 N. L. R. B. 419. Yet the complaint herein was directed solely against the Union. The Board did not deign to explain its failure to join the Company as a party to this case, but rather contented itself with maintaining that it had the discretionary power to select the respondent against which it would proceed. It relied for this discretionary power upon the cases of *Union Starch & Refining Company v. N. L. R. B.* (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815, and *N. L. R. B. v. Newspaper and Mail Delivers Union* (C. A. 2), 192 F. (2nd) 654.

In sustaining the Board's contention on this score, the Court below failed to recognize the distinction between the cited cases and the case *sub judice*, and thus sanctioned conduct of the Board which constituted a clear departure from the established policy of joining employer and union as enunciated by the Board in the case of *N. L. R. B. v. Newman*, *supra*.

In the latter case the Board, explaining its rationale with respect to the joint liability of employer and union, pointed to the following controlling considerations:

(1) In the final analysis, it is the Employer and not the Union that controls the hiring and discharge of his employees.

(2) Undesirable consequences would flow from the failure to join the employer:

- (a) Employers would be willing to "buy peace" by acceding to union's demands, knowing that the Board would permit them to escape liability;
- (b) Minority groups, knowing they could no longer rely on the employer's financial self-interest to

protect their rights, would be inclined to resort to self-help;

- (c) Cases against discordant employees would tend to increase, with the removal of the brake of the employer's self-interest.

The case of *Union Starch & Refining Co., supra*, did not detract from this rationale. In that case, the contention was advanced by the employer that the language of Section 10 (c) required that back pay must be assessed against *either* an employer or a union, *not both*. The Court held that the Board was vested with a reviewable discretionary power to issue a back pay order against the employer or the union, *or both*.

In the case of *N. L. R. B. v. Newspaper and Mail Deliverers Union, supra*, the employer and the union were initially joined, but a settlement agreement was reached with the employer before the case had reached its final conclusion. Under these circumstances, the Court held that it was proper to continue the proceedings against the union alone. But the distinction between the above cited cases and the instant case, is apparent.

It is settled beyond cavil that the existence of coercive union pressure affords no defense to employer discrimination. *Cf. N. L. R. B. v. National Broadcasting Co.* (C. A. 2) 150 F. (2) 895, 900.

In the instant case no reason whatsoever was advanced for the failure to join the employer. Hence, even if it be assumed *arguendo* that the Board has the power to determine who shall be named in and who shall be omitted from a complaint, the failure to join the employer in the instant case was a clear abuse of discretion. The approval by the Court below of the Board's omission of the employer, if left undisturbed, opens wide the door to arbitrary ac-

tion. The discretion which has been held to be a reviewable discretion (*Union Starch & Refining Company, supra*) becomes an absolute discretion.

The consequences, including the possibilities of collusive injury and of arbitrary favoritism, inherent in the approval of this practice under the circumstances here involved are such that they should be condemned by this Court. This is not to say that cases may not arise where it will be proper to proceed against a union alone or an employer alone. Thus, where a union attempts to cause discrimination but the attempt proves unsuccessful because of employer resistance obviously it would be proper to proceed against a union alone, for 8 (b) (2) would be violated though 8 (a) (3) would not. So too, where an employer acknowledges his guilt and agrees to remedy his discriminatory practices, it would obviously be proper to proceed against the union alone. These are rules dictated by necessity and by reason; but the action of the Board in omitting the employer in the instant case was dictated by no such valid consideration.

As one consequence of the failure to join the employer herein, the decree in the instant case clearly contravenes Section 10 (c) in that it contains a back pay provision although no reinstatement direction is contained therein. We urge that, assuming that the Board was empowered to omit the employer as a party, thus precluding itself from the making of a reinstatement direction, it could not decree the payment of back pay against the Union. The language of Section 10 (c) makes it clear that back pay is an incident of reinstatement. Thus, it is "• • • reinstatement of employees with or without back pay • • •" which may be ordered; and under the proviso of Section 10 (c), payment of back pay may be required of a union or employer, as the case may be "• • • where an order directs reinstatement of an employee • • •" (Em-

phasis supplied.) The lack of judicial sanction for the type of order made herein has been recognized by the Board (Sixteenth Annual Report of the National Labor Relations Board, pp. 243-244).

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that *International Brotherhood of Electrical Workers v. N. L. R. B.*, 341 U. S. 694, warranted such deprivation.

The Union maintained that its refusals to issue clearance constituted an expression of its views against the improper discharge of a satisfactory radio officer and against the circumvention of rules designed to accomplish a fair and equitable distribution of work; and that the expression of such views, unaccompanied by any "threat of reprisal or force or promise of benefit" was protected by the provisions of Section 8 (c) of the Act.

The Court below held:

"No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers v. N. L. R. B.*, 2 Cir., 181 F. 2nd 34, 38, aff'd 341 U. S. 694." (R. A. 84-85).

In so holding the Court below applied to this 8 (b) (2) case the rule which this Court enunciated in an 8 (b) (4) (A) case. A reading of *International Brotherhood of Electrical Workers v. N. L. R. B.*, *supra*, clearly shows that the decision of this Court in that 8 (b) (4) (A) case is not controlling in an 8 (b) (1) or 8 (b) (2) case. We need go no further to indicate the error of the Court below than to quote from the opinion of this Court, *viz.*:

"The intended breadth of the words 'induce or encourage' in Section 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of Section 8 (b). For example, the unfair labor practice described in 8 (b) (1) is one to 'restrain or coerce' employees; in 8 (b) (2) it is to 'cause or attempt to cause an employer.' * * * The scope of 'induce' and especially of 'encourage' goes beyond each of them. * * *"

"The remedial function of 8 (c) is to protect non-coercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in 8 (b) (4). The general terms of 8 (c) appropriately give way to the specific provisions of 8 (b) (4)."

If the decision of this Court in the above case should now be extended to cases arising under 8 (b) (2) and 8 (b) (1), as the Court below has done, the protection of free speech guaranteed by 8 (c) will have been destroyed.

POINT III

There was no valid basis for the finding made in this case that the Union's conduct would or did "encourage membership."

The union contended that in refusing clearances it was not motivated by any purpose to "encourage membership"—another necessary ingredient of the offense charged—and further that its conduct did not have the effect of encouraging membership.

As to this, the Court below held that "whether the union's motive was, as it argues, to enforce the contract

provisions against discharging satisfactory radio officers, such as Kozel, is immaterial" * * * and that its conduct in refusing clearance "displayed to all *non-members* the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85). (Emphasis supplied.)

The theory upon which the Court below relied—that of "indirect" or "inherent" encouragement by the effect of the Union's action upon non-members—has been repudiated.

Thus the 8th Circuit in *N. L. R. B. v. Teamsters Union*, 196 F. (2) 1, said:

"The testimony of Boston, however, shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union. The question then is, Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by 'suspicion' and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it."

* In so ruling, the Court below also committed the error of eliminating the question of motive from consideration. The union's dilemma, created by the fact that the issuance of clearance to Fowler would have implied consent to the discharge of Kozel—a discharge expressly forbidden by the contract (R. A. 81) was deemed immaterial. Yet it is now settled beyond peradventure that motivation must be considered. It is not every discrimination which the Act proscribes. The discrimination must be practiced "to encourage or discourage membership". Thus an employer may discharge for any reason or no reason so long as he is not motivated by the desire to "encourage or discourage membership".

So too, in the case of *N. L. R. B. v. Reliable Newspaper Delivery Inc.* (3rd Cir.), 187 F. (2) 547, the Court said:

"Even if we should assume * * * 'discrimination' then under the statutory language, we must go further and ascertain whether the discrimination 'encouraged membership' * * * .

"Generally speaking, the proposition that in order to establish an 8 (a) (3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support."

So too, in the case of *N. L. R. B. v. Webb Construction Company* (8th Cir.), 30 L. R. R. M. 2125, decided May 8, 1952, the Court said:

"There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. *N. L. R. B. v. Winona Textile Mills* (8th Circuit), 160 F. (2) 201; *N. L. R. B. v. Potlatch Forests* (9th Cir.), 189 F. (2) 82; *Western Cartridge Co. v. N. L. R. B.* (7th Cir.), 139 F. (2) 855. * * *

"* * * Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.

"We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act."

We urge that the decision of the Court below is in direct conflict with the above cited decisions of the Third, Seventh, Eighth and Ninth Circuits. Indeed, the Court below has just recognized this difference of opinion at least insofar as the Third Circuit is concerned. In a decision rendered by the Court below on June 24, 1952, in *N. L. R. B. v. Gaynor News Inc.* (not yet officially reported), the Court below said:

"True the Third Circuit in the Reliable case (Reliable Newspaper Delivery, Inc., *supra*) went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. * * * Our own view comes to this: Discriminatory conduct, such as that practiced here, is *inherently conducive* to increased union membership. * * * To this extent *we find ourselves in disagreement with the Reliable case.* * * *" (Emphasis supplied.)

POINT IV

The Court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract, rather than the actual practices and interpretation thereof by the parties.

It was undisputed that if a valid hiring hall arrangement was in existence at the times here pertinent, the Union's actions were justified and protected by the Act.

Both the Board and the Court below held that the language of the contract did not justify the operation of a hiring hall, although concededly a typical lawful hiring hall arrangement had been in practice by the parties when their collective bargaining agreement was extended for the one year period commencing August 16, 1947.

In advocating a test which exalts form over substance the Board relied on the cases of *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695; *N. L. R. B. v. Don Juan, Inc.* (C. A. 2), 178 F. (2nd) 625, 627; and *N. L. R. B. v. Mason Manufacturing Co.* (C. A. 9), 126 F. (2nd) 810, 813.

We urge that in adopting the Board's contention on this score, the Court below misread the teachings of these cases. Carefully read, it is apparent that these cases stand for the proposition that where a union security provision is invoked as a defense to conduct which would be otherwise discriminatory, there must be "a sufficient showing" of the existence of such a valid union security arrangement; but these cases do not hold that when such a valid security arrangement exists in fact it must be disregarded for defects in form. Indeed, in *N. L. R. B. v. Electric Vacuum Cleaner Co., Inc.* (*supra*), the Board found that a written contract was modified by an *oral* provision pertaining to a closed shop. This Court did not disturb this finding but rather rested its decision on the fact that the Union there involved was an "assisted" one.

So, too, in the cases of *N. L. R. B. v. Don Juan, Inc.* (*supra*), and *N. L. R. B. v. Mason Manufacturing Co.* (*supra*), the Court said that there must be "a sufficient showing" that there was a contract for a closed shop.

It is apparent from a reading of all of these decisions that the requirement of "a sufficient showing" was designed to prevent "discrimination" sought to be accomplished on the basis of a pretext or an afterthought, or by a union which did not qualify as one entitled to enforce such union security provisions. But those considerations have no application here; for in the instant case there was "a sufficient showing" that, in fact, a lawful hiring hall arrangement existed.

The error of which the Board and the Court below were guilty in this case was pointed out in the case of *N. L. R. B.*

v. Scientific Nutrition Company (C. A. 9), 180 F. 2nd 447, where the Court said:

"We are persuaded that this concentration on the terms of the writing led the Board to overlook or disregard material and uncontroverted evidence tending to show that Capolino and Local 22832 had long *understood* and *administered* their contract as requiring membership in the local as a condition of employment." (Emphasis supplied.)

The contention that strict construction of verbiage is required even where such strict construction is unnecessary to avoid discrimination based on a pretext or afterthought, is all the more surprising when viewed in the light of other recent decisions of the Board which have disregarded form in favor of substance.

Thus in the case of *Boilermakers AFL (Consolidated Western Steel Corporation)*, 94 N. L. R. B. 1590, the Board said: "On its *face* the hiring clause appears to be *lawful*" • • • yet "This hiring *procedure*, involving preference in hiring to union members, is *unlawful*." (Emphasis supplied.)

Indeed, ironically, the Board has recently held that a clearly expressed unlawful closed shop provision was not violative of 8 (a) (3) and 8 (b) (2) because of "the absence of an intention to enforce it." *Port Chester Electrical Construction Corp.*, 97 N. L. R. B. No. 59.

Fairly read, the record in the instant case leaves no doubt that a lawful hiring hall arrangement existed in fact and that its practice by the parties was unquestionably *ante litem motam*.

Under these circumstances, the use of a rule of strict construction, adopted by our courts to prevent injustice, should not be invoked to produce injustice.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, New York,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.,

Counsel for Petitioners.

FILE COPY

FILED

SEP 11 1952

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM—1952

No. ~~230~~ 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER

The Solicitor General urges that our petition should be denied with respect to questions designated as 1, 2 and 4 at page 7 of our petition. We consider it necessary to reply only with respect to the Solicitor General's argument concerning question 1.

In answering our contention that failure to join the employer was fatal to the proceeding, respondent now asserts for the first time (pp. 15-18), that since Fowler filed a charge against the Union alone and did not file a charge against the Company, that the Board was without power to join the Company as a party.

This argument represents a complete reversal in the position heretofore taken by the Board as expressed in its brief to the Court below, where the Board argued

that: "Whether the Board seeks a remedy against both the Union and the employer or proceeds against one or the other is left to the discretion of the Board". Thus, whereas the Board has heretofore maintained that it had discretion to determine the party or parties against which it would proceed, it now maintains that its failure to join the employer was dictated and controlled by the circumscribed charge filed with it.

The only case cited in apparent support of its present contention that the Board is limited in its right to proceed to remedy an unfair labor practice solely to the person against whom a charge is filed is *Consumers Power Company v. N. L. R. B.*, 113 Fed. (2) 38, 42-43 (C. A. 6). We fail to find in this case, decided under the Wagner Act, any support for such contention. The restricted interpretation of its powers now advanced by the Board in reliance upon Section 10 (b) of the Act, would seem to overlook other countervailing provisions of the Act (cf. Section 10 (a)). Its present position also departs from the long recognized view that "the role of the charge is merely to set in motion the machinery of an inquiry." Cf. *Union Starch & Refining Co. v. N. L. R. B.*, 186 F. (2) 1008 (C. A. 7). The acceptance of the Board's present position would have the effect of rendering nugatory the clear, pervading injunction of the Act that any and every action of the Board shall be designed to "effectuate the policies of the Act".

Assuming, however, that the powers of the Board are as limited as the Board now contends, it cannot be gainsaid that, as a practical matter, the Board could have refused to proceed unless the charging party leveled his charge against the employer as well as the Union. Only so could it enforce the *public* right involved and abide by the injunction contained in the Act that its conduct must be designed to effectuate the policies of the Act. *National Licorice Co. v. Labor Board*, 309 U. S. 350. To permit a

charging party to apprise the Board of facts which add up to an unfair labor practice simultaneously committed by two parties, and to permit such charging party to dictate to the Board that only one of these two shall be made to answer therefor—and this, in the face of clear Board policy as enunciated in *H. M. Newman*, 85 N. L. R. B. 725, results in a situation which is repugnant to the entire spirit of the Act and which transforms the Board into an instrumentality for the vindication of private rather than public rights. *Amalgamated Workers v. Edison Co.*, 309 U. S. 261. As this Court said in *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9:

“It is not required by the statute to move on every charge. * * * It may decline to be imposed upon or to submit its process to abuse.”

The Solicitor General further argues (p. 16) that we have pointed to nothing in the statute and to no judicial authority in direct support of our position on this question. This is so because never before has the propriety of the conduct here engaged in by the Board been directly exposed to judicial scrutiny. To the extent that the point here raised was touched upon in *N. L. R. B. v. Newspaper and Mail Deliverers' Union*, 192 F. (2) 654, and in *Union Starch & Refining Company v. N. L. R. B.*, *supra*, the comments of the Court were mere dicta.

As to our companion contention that the backpay order is invalid without an order of reinstatement, the Solicitor General has cited cases (p. 18, note 13) which are certainly not determinative of the question here raised.

The Wagner Act contained no proviso comparable to that now set forth in unmistakable language in Section 10 (c) of the Act. The language there set forth is clear and unequivocal, *viz.*: “*Provided, That where an order directs reinstatement of an employee backpay may be required of the employer or labor organization, as the case*

may be, responsible for the discrimination suffered by him." The Board's contention on this point can be accepted only at the price of repealing the phrase "*where an order directs reinstatement*" The purposefulness of Congress's intent, in inserting that phrase, with full knowledge of the decisions rendered under the Wagner Act, is emphasized by the fact that it is contained in a proviso which follows the preceding general language of Section 10 (c). It is beyond the power of the Board to repeal that phrase.

In *Progressive Mine Workers v. N. L. R. B.*, 187 Fed. (2) 298 (C. A. 7), 27 L. R. R. M. 2334, the Court correctly pointed out that:

"Sec. 10 (c) contains the Board's *sole authority* for directing backpay". (Emphasis supplied.)

Respectfully submitted,

✓ ABNER H. SILVERMAN,
 ✓ EMANUEL BUTTER,
 ALEXANDER C. RUSSOTTO,
 401 Broadway,
 New York 13, New York,

✓ HERBERT S. THATCHER,
 736 Bowen Building,
 Washington 5, D. C.,

Counsel for Petitioners.

BLURRED COPY

FILE COPY

Office - Supreme Court, U.S.

FILED

NOV 26 1952

No. ~~230~~ 5

Supreme Court of the United States

OCTOBER TERM 1952

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

✓ ABNER H. SILVERMAN,

✓ EMANUEL BUTTER,

✓ ALEXANDER C. RUSSOTTO,

401 Broadway,

New York 13, New York,

Counsel for Petitioner.

✓ HERBERT S. THATCHER,

736 Bowen Building,

Washington 5, D. C.

BLEED THROUGH- POOR COPY

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	8
A. History of the Case	8
B. The Facts of the Case	9
The February Incident	10
The April Incident	13
C. The Board's Findings	15
Specification of Errors to Be Urged	16
Summary of Argument	16
POINT I—The failure to join the employer as a party to the proceedings constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper	16
POINT II—The Order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act, and the Court below erred in ruling that International Brotherhood of Electrical Workers v. N. L. R. B., 341 U. S. 694, warranted such depriva- tion	18

	PAGE
POINT III—There is no valid basis for the findings made in this case that the Union “caused” the Company “by discrimination * * * to encourage * * * membership”	18
POINT IV—The Court below erred in judging the Union’s rights and obligations by the application of a strict construction of the language of the contract rather than the actual practices and interpretation thereof by the parties	19
Argument	19
POINT I—The failure to join the employer as a party to the proceeding constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board’s failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board’s order was wholly improper	19
A. The failure to join the employer as a party to the proceeding constituted fatal error	19
B. In the absence of a reinstatement direction, rendered impossible by the Board’s failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board’s order was wholly improper	25
POINT II—The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that International Brotherhood of Electrical Workers v. N. L. R. B., 341 U. S. 695, warranted such deprivation	26

POINT III—There was no valid basis for the finding made in this case that the Union “cause(d)” the Company “by discrimination” * * * “to encourage * * * membership” 29

A. The Union’s conduct had neither the purpose nor the effect of “encouraging membership” within the meaning of the Act.. 29

POINT IV—The court below erred in judging the Union’s rights and obligations by the application of a strict construction of the language of the contract rather than the interpretation thereof by the parties and their actual practices thereunder 40

CONCLUSION 45

CASES CITED

Amalgamated Workers v. Edison Co., 309 U. S. 261.. 23

Boilermakers AFL (Consolidated Western Steel Corporation), 94 N. L. R. B. 1590 44

Colgate Palmolive Peet Co. v. N. L. R. B., 338 U. S. 355 19

Consumers Power Company v. N. L. R. B., 113 Fed. (2) 38, 42-43 (C. A. 6) 22

International Brotherhood of Electrical Workers v. N. L. R. B., 341 U. S. 694 18, 26, 27

National Licorice Co. v. Labor Board, 309 U. S. 350.. 23

N. L. R. B. v. Don Juan, Inc. (C. A. 2), 178 Fed. (2nd) 625, 627 42, 43

	PAGE
N. L. R. B. v. Electric Vacuum Cleaner Co., Inc., 315	
U. S. 685, 695	42, 43
N. L. R. B. v. Elk Lumber Co., 91 N. L. R. B. 333	34, 36
N. L. R. B. v. Herald Tribune, 93 N. L. R. B. 419	20
N. L. R. B. v. Indiana & Michigan Electric Co., 318	
U. S. 9	23
N. L. R. B. v. International Brotherhood of Team- sters, 196 F. (2), rehearing denied June 2, 1952	30
N. L. R. B. v. Mason Manufacturing Co. (C. A. 9), 126 F. (2nd) 810, 813	42, 43
N. L. R. B. v. National Broadcasting Co. (C. A. 2), 150 F. (2) 895, 900	21
N. L. R. B. v. Newspaper and Mail Deliverers' Union (C. A. 2), 192 F. (2nd) 654	20, 22
N. L. R. B. v. Newman, 85 N. L. R. B. 725 enforced (C. A. 2), 187 F. (2d) 488	21, 23
N. L. R. B. v. Reliable Newspaper Delivery Inc. (3rd Cir.) 187 F. (2) 547	30
N. L. R. B. v. Scientific Nutrition Company (C. A. 9), 180 F. (2nd) 447	43
N. L. R. B. v Webb Construction Company (8th Cir.), 196 F. 2nd 702, 30 L. R. R. M. 2125, decided May 8, 1952	30, 33
Port Chester Electrical Construction Corp., 97	
N. L. R. B. No. 59	44
Progressive Mine Workers v. N. L. R. B., 187 Fed. (2) 298 (C. A. 7), 27 L. R. R. M. 2334	26
Union Starch & Refining Company v. N. L. R. B. (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815	20, 21, 22, 23
Victor Manufacturing and Gasket Co. v. N. L. R. B., 175 F. (2) 867 (C. A. 7)	34

STATUTES CITED

	PAGE
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, <i>et seq.</i>):	
Sec. 8 (3)	3, 16
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 <i>et seq.</i>):	
Sec. 7	4
Sec. 8 (a)	4
Sec. 8 (b)	4
Sec. 8 (b) (1)	5, 32
Sec. 8 (b) (2)	5, 17
Sec. 8 (c)	6
Sec. 10 (a)	6
Sec. 10 (c)	6
Sec. 10 (e)	6
Sec. 102	7
Sec. 10 (c)	17, 25

MISCELLANEOUS

Sixteenth Annual Report of the National Labor Relations Board, pp. 243, 244	26
Conference Report, House Report 510, 80th Congress, pp. 42, 43	28

BLEED THROUGH- POOR COPY

No. 230

Supreme Court of the United States

OCTOBER TERM 1952

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. A. 78-90) is reported at 196 Fed. 2nd, 960. The findings of fact, conclusions of law and order of the Board (B. A. 22-75) are reported at 93 N. L. R. B. 1523.¹

¹For purposes of this Brief, the printed record before this Court consists of two separately paginated volumes: the Appendix to the Union's brief in the court below, herein designated "R. A.", and the Appendix to the Board's brief in the court below, designated "B. A." The proceedings in the court below are bound with and paginated continuously from the end of the Union's Appendix below.

Jurisdiction

The decree of the Court of Appeals (R. A. 90-93) was entered on May 22, 1952. The petition for a writ of certiorari was filed on July 28, 1952, and was granted October 20, 1952. The jurisdiction of this Court rests on Section 10(e) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), and 28 U. S. C. 1254.

Questions Presented

1. Where it is charged that a Union violated 8 (b) (2) of the Act in that it caused an employer to violate 8 (a) (3) of the Act, (a) Is it proper for the Board to omit the employer as a party and proceed solely against the Union?; (b) Assuming that this may be done, does Section 10 (c) of the Act permit the making of a back pay direction in the absence of a reinstatement direction?
2. Is a Union deprived of its right of free speech as guaranteed by Section 8 (c) when it is found guilty of violating Section 8 (b) (2) and 8 (b) (1) (A), for refusing to issue a "clearance" despite the fact that "no threat of reprisal or force or promise of benefit" is made?
3. May a finding that "discrimination" was practiced for the purpose of "encouraging membership" be predicated upon an assumption that "discriminatory conduct" constitutes "inherent" encouragement of membership?
4. Is the existence of a valid union security arrangement, actually practiced by the parties, unavailable as a defense unless evidenced by clear written language?

Statutes Involved

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) and the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are hereinbelow set forth.

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

.

(b) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible

to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

.

(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a). The Board is empowered, as herein-after provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of ap-

peals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

.

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this

title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

Statement

A. History of the Case.

This proceeding is founded upon a charge filed by Willard Christian Fowler against the Radio Officers' Union of the Commercial Telegraphers Union, A. F. L. (hereinafter designated the Union), alleging that it caused an employer, the Bull Steamship Company (hereinafter called the Company), discriminatorily to refuse him employment. The complaint, based upon said charge, issued only after the General Counsel to the Board had overruled the determination of the Board's Regional Director that no complaint should issue on the basis of the facts disclosed by his investigation of the charge (R. A. 2).

Following the usual proceedings under Section 10 (c) of the Act, the Board, Member Murdock dissenting *in toto* and Member Reynolds dissenting in part, issued its findings of fact, conclusions of law, and order on April 18, 1951 (B. A. 22-75) which adopted with modifications the findings and conclusions of the Trial Examiner finding the Union guilty of violations of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act (B. A. 22-37). By the Board's order, the Union was required to cease and desist from such unfair labor practices and affirmatively give notice that it withdraws objections to Fowler's employment by the Com-

pany and also to make Fowler whole for any loss he may have suffered by reason of the Union preventing his employment.² The Board's decision is reported in 93 N. L. R. B. 249.

By a divided Court, the Court below decreed enforcement of the Board's order. The majority opinion written by Judge Swan and concurred in by Judge Learned Hand, and the dissenting opinion of Judge Clark are appended to the record (R. A. 79-90).

B. The Facts of the Case.

As exclusive bargaining representative of the radio officers employed by 24 named steamship companies, including the Company, the Union and said companies executed a "standard" (B. A. 118, 213-214) collective bargaining agreement on January 11, 1947, covering the Company's radio officers. After the enactment of the Taft-Hartley Act, but prior to its effective date, the Union and the Company, on August 16, 1947, extended the term of the agreement until August 15, 1948.³ The pertinent provisions of the collective bargaining agreement with respect to the employment of radio officers are set forth in the opinion of the Court below (R. A. 80-81).

It is undisputed that, in actual operation, the employment procedure which had been generally followed by the parties to the agreement prior to the extension of the term of the agreement, was that of a typical union hiring hall arrangement, *i. e.*, the Companies under contract with the Union requested the Union to furnish radio officers to fill vacancies as they occurred; to meet these requests, the Union's rules and by-laws provided for the maintenance

² The Court below did leave open for determination in the compliance proceedings the question of the effect upon the back pay provision of Fowler's refusal to accept comparable work on other ships (R. A. 85).

³ The validity of the contractual provisions theretofore in existence was thus preserved under Section 102 of the Act.

of a "shipping list" of its unemployed members arranged in the order of the termination of their last employment; when a request for a radio officer was received from a Company, the Union offered the assignment to those of its members who were seeking assignment, preference being given to the member longest unemployed; the member entitled thereto by the application of these rules was given "the necessary 'clearance'" (B. A. 45, R. A. 82). This method of filling jobs was so well understood and the practice so firmly established that it was only "very very infrequently" (B. A. 167, 192-194) that requests were received by the Union for any specific man. While the record sustains the Board's finding that "on some few occasions companies have asked that particular radio officers be assigned to them" (B. A. 46) the record shows that requests of that type occurred primarily during the war years when there was so great a shortage of men that there was no time lapse between availability for employment and ability to get a job so that the enforcement of the principle of rotation in issuing assignments to work was of only academic interest (R. A. 37).

Fowler, a ship's radio officer joined the Union on July 1, 1942, and was a member thereof in February and April of 1948 when the alleged unfair labor practices occurred. He had never had any difficulty in his relations with the Union (R. A. 16, 49).

The February Incident

On or about February 24, 1948, the S. S. FRANCES, one of the Company's ships, docked in the City of New York (B. A. 46). A member of the Union, Alexander Kozel, was the radio officer aboard, having been hired by the Company through the Union hiring hall at New Orleans, on December 29, 1947 (B. A. 46, 67). It appears that upon arrival of the vessel, Robert H. Frey, the Company's Radio Supervisor, had a conversation with Kozel and that on the

basis of this conversation, Kozel was led to believe that although his services were satisfactory, he was to be replaced by another radio officer (B. A. 46). Kozel objected to being discharged (R. A. 30). He called at the office of the Union and registered a complaint concerning his suspected discharge (B. A. 157, R. A. 35). After two or three visits to the Union in connection with his complaint concerning this unwarranted discharge,⁴ Kozel appeared at the Union office on Friday, February 27th at about 3 o'clock, reported that his suspicions had been confirmed, and that a new radio officer, Fowler, had come aboard the vessel (R. A. 35). Thereupon, Fred M. Howe, General Secretary-Treasurer of the Union dispatched telegrams to both Fowler and Vice-President Kiggins of the Company (B. A. 85, 182, 212, 205, 173; R. A. 49). In these telegrams Howe advised Fowler that he was thereby suspended "on grounds that you neglected to obtain clearance for your present job and also for being a party to depriving another member of his job".⁵ The Company was advised that Fowler was not in good standing "on grounds that forcing another member out of employment is strictly against Union by-laws" and "I again quote the provisions of our agreement requiring a clearance for all such job (*sic*)" (B. A. 48). Howe testified that shortly after these telegrams had been dispatched he received a call from Capt. Williams, Port Captain of the employer, requesting him to hold the matter in abeyance until he could investigate the matter (B. A. 51); that he also received a call from Fowler, who thereafter on

⁴ The contract clearly forbade the discharge of any radio officer whose services were satisfactory (R. A. 72, 81; B. A. 118).

⁵ It was conceded that Fowler's conduct warranted suspension (R. A. 61). The Board held, however, that no suspension had been validly accomplished (B. A. 26-27). The cogent dissent by Board members Murdock and Reynolds and by Judge Clark below appear at B. A. 35, B. A. 27 note 9; R. A. 89. We refrain from discussing this question at length because of the transcendent importance of the other questions involved herein.

March 1st, visited him at his office and discussed the matter.

The testimony concerning these conversations makes it abundantly clear that (a) Fowler had gone aboard the S. S. FRANCES without any notification to the Union of his intention so to do, and without any "clearance" for the job (B. A. 114); (b) that Kozel, the incumbent radio officer registered complaints with the Union against his discharge (R. A. 30; B. A. 115); (c) that in the light of these facts, Howe, during the personal conversation, called Fowler to task for being a party to the "bumping" of a fellow member of the Union, whereupon Fowler disavowed any intent to ship without a Union clearance (B. A. 89), stated that he would not have had anything to do with the job had he known that it was filled (B. A. 120); that the entire incident had come about as the result of a "big misunderstanding" and that he wanted to "forget about it * * * go back to Miami, and let the whole matter drop" (B. A. 52-53, 92). Thereupon, the "suspension" was tacitly nullified and Mr. Howe urged Fowler to take a job aboard some other ship since he had come up from Miami, but Fowler preferred to go back to Miami (B. A. 92).

The testimony concerning the occurrences after this conversation is conflicting, Howe maintaining that he heard nothing further from Fowler and assumed that he had returned to Miami, in accordance with Fowler's admitted statement of his intention so to do (B. A. 52; R. A. 43), Fowler maintaining that he did communicate with Howe on Tuesday, March 2, before leaving for Miami (B. A. 53). As to this alleged latter conversation, testified to by Fowler, the Trial Examiner found that it comprised a "protest" predicated upon Fowler's mistaken belief that the new man assigned to the vessel, Miller, had a license which was only a month old, which fact, if true, would have entitled Fowler to priority under the Union's assignment rules (B. A. 53) (but see B. A. 53, note 5). At this

point it should be mentioned that because of the unpleasantness created by the entire incident, and his fear that his continuance aboard the S. S. FRANCES would not be pleasant, Kozel decided to relinquish the berth (B. A. 169), and the job was thereupon filled in the usual manner, Union-member Miller, as the member longest unemployed, receiving the assignment (B. A. 183).

Fowler testified that he returned to Miami on March 3rd (B. A. 93).

The April Incident

After Fowler's return to Miami, he forwarded a dues payment to the Union. This payment was acknowledged by a letter from Mr. Howe, dated March 25, 1948 (B. A. 94, 207). The reference in this letter to a change of companies was in accord with the personal conversation admittedly had between Fowler and Howe during the February incident, in the course of which Howe had discussed with Fowler the advantages of diversified experience (B. A. 20, 50-51). Fowler testified and the Board found that Fowler returned to New York and visited the Union Hall on April 24; that although he made no request for a job, Howe told him that plenty of jobs were available to him, but that he would not be given clearance for a Bull Line ship; that Fowler said he would return to the Union Hall; and that he thereafter appeared at the office of the Union on Monday morning, April 26, 1948 between 9 and 10 a. m. (B. A. 55; 98-99).

On that morning, certain job openings, including one aboard the S. S. RAPHAEL SEMMES, were announced in accordance with the regular practice and procedure of the Union. All of the members in the Union Hall at the time, including Fowler, bid for the job aboard the S. S. RAPHAEL SEMMES of the Waterman Steamship Lines (B. A. 55; 99) which was covered by the same "standard" agreement which applied to the Bull Steamship Co. Thereupon

Joseph Glynn then in charge of the Union office announced that Fowler, as the member longest out of work, was the successful bidder (B. A. 55; 99). Fowler thereupon requested and received a clearance to the S. S. RAPHAEL SEMMES (B. A. 55; 99), although he did so with a reservation that he was not sure he would take the ship (B. A. 55; 100). Thereupon he left the Union Hall and admittedly never thereafter returned to the Union Hall (R. A. 52; B. A. 107). Shortly after Fowler's departure, Frey called the respondent's office and spoke with Glynn (B. A. 191). He asked whether Fowler was at the respondent's office. He was told by Glynn that he had been there but had just left for a ship of the Waterman Steamship Lines. Glynn testified that that was the full substance of the conversation (B. A. 191). Frey, on the other hand, denied that Glynn informed him that Fowler had been there and left (which was the fact), and maintained that as part of the conversation he made known to Glynn that he wanted to get a clearance for Fowler on the Company's S. S. EVELYN (B. A. 200-201).

Meanwhile, armed with the clearance he had obtained at the Union Hall, Fowler visited the S. S. RAPHAEL SEMMES but decided not to take the berth. Later that afternoon, he phoned Howe, but mistakenly addressed him as "Mr. Frey", whereupon Howe asked what Fowler was doing at the Bull Line. Fowler replied that he had gone there to collect "some back pay", whereupon an argument ensued during which Howe accused Fowler of lying and of attempting to steal some more jobs from other members, while Fowler said "No, I was not. I just went by there to collect some back pay * * *" (B. A. 56; 102); that upon this unexpected turn of events, Fowler never did tell Howe that he had spoken with Frey and had received a job offer from him (B. A. 56), and did not ask Howe for any clearance (B. A. 131).

Fowler testified further that during the course of the argument Howe said to him "As far as I am concerned, you are through. Why don't you go over and join the A.C.A. (a rival union affiliated with the C.I.O.) (B. A. 103).

On the following day, April 27th, the Union was requested by the Bull Line to assign a man to its S. S. EVELYN, and this was done (B. A. 192). Fowler returned to Miami on April 28th and did not return to New York for over a year thereafter (B. A. 105).

C. The Board's findings.

The Board found that on or about February 28, 1948, and on or about April 26, 1948, Fowler was offered employment directly by the Company, subject to his ability to obtain "the necessary 'clearance' " from the Union; that the Union refused to issue the necessary clearance; that the Company refused to hire Fowler without the clearance; that Fowler was thus deprived of the proffered employment (B. A. 58, R. A. 84).

The Board found that the Union's refusal to issue the clearance to Fowler was motivated by its desire "to enforce against him as one of its members, the rules of fair dealing between its members it had prescribed for their mutual benefit" (B. A. 59). More specifically, that the Union refused clearance because (1) it wished to express its disapproval of the attempt to hire Fowler directly in circumvention of its hiring hall rules, and (2) because in the February incident, Fowler's hire by the Company would have caused the displacement of Kozel, another member of the Union, whose services had been admittedly satisfactory to the Company (B. A. 59).

Based on the foregoing facts, it has been found that the Union violated 8 (b) (2) and 8 (b) (1) (A) of the Act. The reasoning to support this finding runs thus: despite the rules of the Union and the practices of the parties to the contract, the *language* of the contract was such that it

obligated the Union to issue a clearance to any member in good standing regardless of any consideration other than "good standing" (R. A. 44-45); the Union's refusal to issue clearance caused the Company to discriminate against Fowler in a manner which was violative of Section 8 (a) (3); hence, the Union was guilty of violating 8 (b) (2). Further, that in refusing clearance, the Union was attempting to compel Fowler to conform to the hiring hall practice above described, thus "coercing and restraining" him in the exercise of his right "to refrain from concerted activities" as guaranteed in Section 7 of the Act, and that the Union thereby violated Section 8 (b) (1) (A) of the Act (B. A. 64-68; R. A. 84).

Specification of Errors To Be Urged

For the reasons set forth, *infra*, the Court below erred in granting enforcement of the Board's order.

Summary of Argument

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

- A. The failure to join the employer as a party to the proceeding constituted fatal error.

Section 8 (a) (3) of the Act makes it unlawful for an employer

"by discrimination in regard to * * * employment * * * to encourage or discourage * * * membership in any labor organization."

Section 8 (b) (2) makes it unlawful for a Union

“to cause or attempt to cause an employer to discriminate * * * in violation of Sub-Section 8 (a) (3). * * *”

In this case the employer refused to hire Fowler because of the Union's refusal to issue a “clearance.” If and only if, the employer's refusal to hire Fowler under these circumstances was violative of Section 8 (a) (3), would the Union be guilty of violating Section 8 (b) (2). Hence, if the Union was guilty of an unfair labor practice under the facts of this case, the Company was equally guilty thereof; and the Board could not enforce the public rights involved without proceeding against both the employer and the Union.

B. In the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

Section 10 (c) of the Act empowers the Board to issue an order requiring

“such affirmative action including *reinstatement* of employees *with or without* back pay, as will effectuate the policies of this Act: *Provided, That where an order directs reinstatement* of an employee back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.”

In the instant case, no reinstatement direction was made, the Board having rendered itself powerless to make such direction by the failure to join the employer. In the absence of such reinstatement direction the Board was without power to make a direction for the payment of back pay.

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act, and the Court below erred in ruling that *International Brotherhood of Electrical Workers v. N. L. R. B.*, 341 U. S. 694, warranted such deprivation.

In holding that "no threats or promises to the Company were necessary", in reliance on the case of *International Brotherhood of Electrical Workers v. N. L. R. B.* (*supra*), the Court below improperly applied to this 8 (b) (2) case the rules which this Court enunciated in the above case, which dealt with an 8 (b) (4) (A) violation.

POINT III

There is no valid basis for the findings made in this case that the Union "caused" the Company "by discrimination * * * to encourage * * * membership".

A. The Union's conduct had neither the purpose nor the effect of "encouraging membership" within the meaning of the Act.

B. The Union was not guilty of "discrimination" within the meaning of the Act:

- (1) In applying to Fowler, as a member of the Union, the same rules which governed all other members of the Union, the Union was guilty of no discrimination.
- (2) The Union did not "restrain or coerce" Fowler in the exercise of his "right to refrain from concerted activities."

C. The Union's conduct did not constitute "cause."

POINT IV

The Court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract rather than the actual practices and interpretation thereof by the parties.

The majority of the Court below followed the majority of the Board in shutting its eyes to the actualities of the hiring practices of the parties as they existed when the contract was extended until August 1948. We shall show that it was error to apply to this case a rule of strict construction of language which was inappropriate to the case.

ARGUMENT

POINT I

The failure to join the employer as a party to the proceeding constituted fatal error; and in the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.

A. The failure to join the employer as a party to the proceeding constituted fatal error.

The finding that the Union in the instant case violated Section 8 (b) (2) is predicated on the finding that it caused the employer to engage in conduct which was violative of Section 8 (a) (3).⁶

It is thus apparent that if the Union was guilty of violating 8 (b) (2) the Company was equally guilty of vio-

⁶ The contention that under the Board's interpretation of the Act as applied to this case, the employer's conduct was not violative of 8 (a) (3) under the rule enunciated in *Colgate Palmolive Peet Co. v. N. L. R. B.*, 338 U. S. 355, and that hence the Union was not guilty of violating 8 (b) (2) was overruled.

lating 8 (a) (3). *N. L. R. B. v. Herald Tribune*, 93 N. L. R. B. 419. Yet the complaint herein was directed solely against the Union. In the Court below, the Board did not deign to explain its failure to join the Company as a party to this case, but rather contented itself with maintaining that it had the discretionary power to select the respondent against which it would proceed. It relied for this discretionary power upon the cases of *Union Starch & Refining Company v. N. L. R. B.* (C. A. 7), 186 F. 2nd 1008, certiorari denied, 342 U. S. 815, and *N. L. R. B. v. Newspaper and Mail Deliverers' Union* (C. A. 2), 192 F. (2nd) 654.

The Court below sustained the Board in this contention (R. A. 85).

In its Memorandum to this Court in opposition to our petition for the writ, the Board reversed its position on this score, and for the first time contended that since Fowler filed a charge against the Union alone and did not file a charge against the Company, that the Board was *without power* to join the Company as a party (p. 16, Memo for N. L. R. B. on petition for writ).

We urge that the Board's attempt to justify its failure to join the employer, whether predicated upon absolute discretion or lack of choice, must fail. If the joinder of the employer be discretionary, the failure to join it was so clear an abuse of discretion in the light of the established Board policy hereinbelow discussed, that the failure to do so was fatal. If the question be one of power, the short answer is that the Board was not required to proceed in a manner involving a clear abuse of its processes—processes which must always take into account the effectuation of the basic purposes of the Act.

In sustaining the Board's contention as to its discretionary power advanced in the Court below, the Court below failed to recognize the distinction between the cases cited in support thereof and the case *sub judice*, and thus

sanctioned conduct of the Board which constituted a clear departure from the established policy of joining employer and union as enunciated by the Board in the case of *N. L. R. B. v. Newman*, 85 N. L. R. B. 725 enforced (C. A. 2) 187 F. (2d) 488.

In the latter case the Board, explaining its rationale with respect to the joint liability of employer and union, pointed to the following controlling considerations:

(1) In the final analysis, it is the employer and not the Union that controls the hiring and discharge of his employees.

(2) Undesirable consequences would flow from the failure to join the employer:

- (a) Employers would be willing to "buy peace" by acceding to union's demands, knowing that the Board would permit them to escape liability;
- (b) Minority groups, knowing they could no longer rely on the employer's financial self-interest to protect their rights, would be inclined to resort to self-help;
- (c) Cases against discordant employees would tend to increase, with the removal of the brake of the employer's self-interest.

(3) Analogously to tort law, "when the acts of two or more persons result in a legal wrong all the joint tortfeasors are jointly and severally responsible for the entire damages, without regard to which of them initiated the wrong, and even though one of them may have acted under duress." Cf. *N. L. R. B. v. National Broadcasting Co.* (C. A. 2), 150 F. (2) 895, 900.

The case of *Union Starch & Refining Co.*, *supra*, did not detract from this rationale. In that case, the contention was advanced by the employer, who had been joined, that

the language of Section 10 (c) required that back pay must be assessed against *either* an employer or a union, *not both*. The Court held that the Board was vested with a reviewable discretionary power to issue a back pay order against the employer or the union, *or both*.

In the case of *N. L. R. B. v. Newspaper and Mail Deliverers' Union*, *supra*, the employer and the union were initially joined, but a settlement agreement was reached with the employer before the case had reached its final conclusion. Under these circumstances, the Court held that it was proper to continue the proceedings against the union alone.

But the distinction between the above cited cases and the instant case, is apparent.

The only case cited in apparent support of the Board's present contention that the Board is limited in its right to proceed to remedy an unfair labor practice solely to the person against whom a charge is filed is *Consumers Power Company v. N. L. R. B.*, 113 Fed. (2) 38, 42-43 (C. A. 6). We fail to find in this case, decided under the Wagner Act, any support for such contention. The restricted interpretation of its powers now advanced by the Board in reliance upon Section 10 (b) of the Act, would seem to overlook other countervailing provisions of the Act (Cf. Section 10 (a)). Its present position also departs from the long recognized view that "the role of the charge is merely to set in motion the machinery of an inquiry." Cf. *Union Starch & Refining Co. v. N. L. R. B.*, *supra*. The acceptance of the Board's present position would have the effect of rendering nugatory the clear, pervading injunction of the Act that any and every action of the Board shall be designed to "effectuate the policies of the Act".

Assuming, however, that the powers of the Board are as limited as the Board now contends, it cannot be gainsaid that, as a practical matter, the Board could have refused

to proceed unless the charging party leveled his charge against the employer as well as the Union. Only so could it enforce the public right involved and abide by the injunction contained in the Act that its conduct must be designed to effectuate the policies of the Act. *National Licorice Co. v. Labor Board*, 309 U. S. 350. To permit a charging party to apprise the Board of facts which appear to add up to an unfair labor practice simultaneously committed by two parties, and to permit such charging party to dictate to the Board that only one of these two shall be made to answer therefor—and this, in the face of clear Board policy as enunciated in *H. M. Newman, supra*, results in a situation which is repugnant to the entire spirit of the Act and which transforms the Board into an instrumentality for the vindication of private rather than public rights. *Amalgamated Workers v. Edison Co.*, 309 U. S. 261. As this Court said in *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9:

“It is not required by the statute to move on every charge. * * * It may decline to be imposed upon or to submit its process to abuse.”

Whether predicated upon “discretion” or upon “lack of power” the approval by this Court of the Board’s omission of the employer, would open wide the door to arbitrary action. The discretion which has been held to be a reviewable discretion (*Union Starch & Refining Company, supra*), would become an absolute discretion.

The possible evil consequences, including those of collusive injury and of arbitrary favoritism, inherent in the approval of this practice under the circumstances here involved are readily foreseeable. This is not to say that cases may not arise where it will be proper to proceed against a union alone. Thus, where a union *attempts* to cause discrimination but the attempt proves unsuccessful because of employer resistance, obviously it would be

proper to proceed against the union alone, for 8 (b) (2) would be violated though 8 (a) (3) would not. So too, where an employer acknowledges his guilt and agrees to remedy his discriminatory practices, patently it would be proper to proceed against the union alone. These are rules dictated by necessity and by reason and involve no frustration of the policies of the Act; but the action of the Board in omitting the employer in the instant case was dictated by no such valid consideration, and clearly does involve a frustration of those policies.

If the Board's action in this case be approved, what becomes of the cogent considerations pointed out in the *Newman* case? The only answer which the Board has given to this question is that

"the *Newman* case is wholly inapposite, for there both the union and the employer responsible for the discrimination against an employee were before the Board as the parties respondent. The only question of policy presented in that case was whether, in such circumstances, both parties respondent should be held jointly and severally liable to make the employee whole." (Page 18 Memo of N.L.R.B. on petition for the writ.)

If then it is the Board's policy to find both employer and union jointly and severally liable when they *are* both parties to a proceeding, how justify the failure to *make* them both parties to the proceeding?

Had the employer herein been joined, the effectuation of the policies of the Act clearly would have required that a finding be made against the employer no less than against the Union. Can the Board escape its duty by the simple expedient of omitting the employer at the outset and then pleading its inability to discharge its public duty?

- B. In the absence of a reinstatement direction, rendered impossible by the Board's failure to join the employer as a party to the proceeding, the back pay provision incorporated in the Board's order was wholly improper.**

As one consequence of the failure to join the employer herein, the decree in the instant case clearly contravenes Section 10 (c) in that it contains a back pay provision although no reinstatement direction is contained therein. We urge that, assuming that the Board was empowered to omit the employer as a party, thus precluding itself from the making of a reinstatement direction, it could not decree the payment of back pay against the Union. The language of Section 10 (c) makes it clear that back pay is an incident of reinstatement. Thus, it is " * * * reinstatement of employees with or without back pay * * *" which may be ordered; and under the proviso of Section 10 (c), payment of back pay may be required of a union or employer, as the case may be " * * * *where an order directs reinstatement of an employee* * * * ." (Emphasis supplied.)

The Wagner Act contained no proviso comparable to that now set forth in unmistakable language in Section 10 (c) of the Act. The language there set forth is clear and unequivocal, viz.: "*Provided, That where an order directs reinstatement of an employee back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.*" The Board's arguments in opposition to our contention on this point can be accepted only at the price of repealing the phrase "*where an order directs reinstatement*". The purposefulness of Congress's intent, in inserting that phrase, with full knowledge of the decisions rendered under the Wagner Act, is emphasized by the fact that it is contained in a proviso which follows the preceding general language of Section 10 (c). Had Congress intended to empower the Board to order back pay even

where no reinstatement direction was made, it could have readily omitted "where an order directs reinstatement"; but it is beyond the power of the Board to repeal that phrase.

In *Progressive Mine Workers v. N.L.R.B.*, 187 Fed. (2) 298 (C. A. 7), 27 L. R. R. M. 2334, the Court correctly pointed out that:

"Sec. 10 (c) contains the Board's *sole authority* for directing backpay." (Emphasis supplied.)

Cases which hold that reinstatement may be ordered without a direction for back pay furnish no authority for the converse situation of a back pay order without a reinstatement direction, for the Act clearly vests the Board with the power to direct reinstatement *with or without back pay*.

The lack of judicial sanction for the type of order made herein has been recognized by the Board (Sixteenth Annual Report of the National Labor Relations Board, pp. 243, 244).

POINT II

The order of the Board deprived the Union of the rights of free speech guaranteed to it by Section 8 (c) of the Act; and the Court below erred in ruling that *International Brotherhood of Electrical Workers v. N. L. R. B.*, 341 U. S. 694, warranted such deprivation.

The Union maintained that its refusals to issue clearance constituted an expression of its views against the improper discharge of a satisfactory radio officer and against the circumvention of rules designed to accomplish a fair and equitable distribution of work; and that the expression of such views, unaccompanied by any "threat of reprisal or force or promise of benefit" was protected by the provisions of Section 8 (c) of the Act.

The Court below held:

"No threats or promises to the company were necessary. See *International Brotherhood of Electrical Workers v. N. L. R. B.*, 2 Cir. 181 Fed. 2nd 34, 38, aff'd 341 U. S. 694" (R. A. 84-85).

In so holding, the Court below applied to this 8 (b) (2) case the rule which this Court enunciated in an 8 (b) (4) (A) case. A reading of *International Brotherhood of Electrical Workers v. N. L. R. B.*, *supra*, clearly shows that the decision of this Court in that 8 (b) (4) (A) case is not controlling in an 8 (b) (1) or 8 (b) (2) case. We need go no further to indicate the error of the Court below than to quote from the opinion of this Court, *viz.*:

"The intended breadth of the words 'induce or encourage' in Section 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of Section 8 (b). For example, the unfair labor practice described in 8 (b) (1) is one to 'restrain or coerce' employees; in 8 (b) (2) it is to 'cause or attempt to cause an employer' * * * The scope of 'induce' and especially of 'encourage' goes beyond each of them. * * *"

"The remedial function of 8 (c) is to protect non-coercive speech by employer and labor organization alike in furtherance of a lawful object. It serves that purpose adequately without extending its protection to speech or picketing in furtherance of unfair labor practices such as are defined in 8 (b) (4). The general terms of 8 (c) appropriately give way to the specific provisions of 8 (b) (4)."

If the decision of this Court in the above case should now be extended indiscriminately to cases arising under 8 (b) (2) and 8 (b) (1), as the Court below has done, the protection of free speech guaranteed by 8 (c) will have been destroyed.

The Board implies that since the Union's refusal to issue clearance resulted in Fowler's inability to get the job, that this refusal constituted something more than an "expression of views, arguments or opinions." In this connection, the facts of the case must be borne in mind. While the Union refused to issue clearance, the clearance being a written form assigning a radio officer to a specific job (R. A. 75-77), because it refused to be a party to the circumvention of its hiring hall rules and to the wrongful discharge of Kozel, the record is clear that no "threat of reprisal or force or promise of benefit" was made. Thus the ruling in this case says in effect that the Union was forbidden to state that it refused to be a party to the violation of its rules—was forbidden to state that it refused to write an endorsement of Fowler's attempt to displace another member. Further it says that the failure of the Union to issue clearance in and of itself is "restraint and coercion" even if the Union did nothing further and intended to do nothing further to interfere with the taking of a job. This holding goes far beyond anything which Congress intended to proscribe when it banned the use of "restraint or coercion." This Court will recall that as originally drafted the Act proscribed not only "restraint or coercion" but also "interference with" an employee's rights. As finally enacted, the words "interference with" were omitted for the specific purpose of assuring the fact that "interference" as distinguished from "restraint or coercion" was not made a Union unfair labor practice (*Cf.* Conference Report, House Report 510, 80th Congress pp. 42, 43).

Thus, even if the Union's refusal to issue clearance "interfered" with Fowler obtaining the job, it did not constitute "restraint or coercion". If the protection of the right to express "views, arguments or opinions" is to have any meaning, then under the facts of this case, the Union, abjuring any violence or threat was certainly free to say: "We refuse to issue a clearance which does violence to our rules and which would make us a party to the deprivation

of the clear rights of one of our members (Kozel)'. Under the facts of this case how else could the Union have expressed its views?

POINT III

There was no valid basis for the finding made in this case that the Union "cause(d)" the Company "by discrimination" * * * "to encourage * * * membership".

A. The Union's conduct had neither the purpose nor the effect of "encouraging membership" within the meaning of the Act.

The Union contended that in refusing clearance, it was not motivated by any purpose to "encourage membership"—another necessary ingredient of the offense charged—and further that its conduct did not have the effect of encouraging membership.

As to this, the Court below held that "whether the Union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers, such as Kozel, is immaterial" * * * and that its conduct in refusing clearance "displayed to all *non-members* the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85). (Italics supplied.)

¹ In so ruling, the Court below also committed the error of eliminating the question of motive from consideration. The Union's dilemma, created by the fact that the issuance of clearance to Fowler would have implied consent to the discharge of Kozel—a discharge expressly forbidden by the contract (R. A. 81)—was deemed immaterial. Yet it is now settled beyond peradventure that motivation must be considered. It is not every discrimination which the Act proscribes. The discrimination must be practiced "to encourage or discourage membership". Thus an employer may discharge for any reason or no reason so long as he is not motivated by the desire to "encourage or discourage membership".

The theory upon which the Court below thus relied—that of “indirect” or “inherent” encouragement by the effect of the Union’s action upon non-members—has been repudiated.

Thus the 8th Circuit in *N. L. R. B. v. International Brotherhood of Teamsters*, 196 F. (2), rehearing denied June 2, 1952, said:

“The testimony of Boston, however, shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union. The question then is, Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by ‘suspicion’ and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it”.

So too, in the case of *N. L. R. B. v. Reliable Newspaper Delivery Inc.* (3rd Cir.) 187 F. (2) 547, the Court said:

“Even if we should assume * * * ‘discrimination’ then under the statutory language, we must go further and ascertain whether the discrimination ‘encouraged membership’ * * *.

“Generally speaking, the proposition that in order to establish an 8 (a) (3) violation there must be evidence that the employer’s act encouraged or discouraged union membership has widespread support.”

So too, in the case of *N. L. R. B. v. Webb Construction Company* (8th Cir.), 196 F. 2nd 702, 30 L. R. R. M. 2125, decided May 8, 1952, the Court said:

“There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging mem-

bership in a labor organization. *N. L. R. B. v. Winona Textile Mills* (8th Circuit), 160 F. (2) 201; *N. L. R. B. v. Potlatch Forests* (9th Cir.), 189 F. (2) 82; *Western Cartridge Co. v. N. L. R. B.* (7th Cir.), 139 F. (2) 855 * * *.

"* * * Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members. No one is required to join the union and subject himself to such rules and regulations; neither is there any inhibition against his withdrawing from the union if such rules and regulations are not satisfactory to him.

"We conclude that the termination of Pickard's employment did not reasonably tend to encourage membership in respondent union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act."

We urge that the decision of the Court below is in direct conflict with the above cited decisions of the Third, Seventh, Eighth and Ninth Circuits. Indeed, the Court below has just recognized this difference of opinion at least insofar as the Third Circuit is concerned. In a decision rendered by the Court below on June 24, 1952, in *N. L. R. B. v. Gaynor News, Inc.* (not yet officially reported), the Court below said:

"True the Third Circuit in the *Reliable* case (*Reliable Newspaper Delivery, Inc.*, supra) went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. * * * Our own view comes to this: Discriminatory conduct, such as that practiced here, is *inherently conducive* to increased union membership * * *. To this extent we find ourselves in disagreement with the *Reliable* case. * * *" (Emphasis supplied.)

It, therefore, becomes necessary for this Court to resolve the differences in the views respectively held by the above Circuits.

The Board urges that "membership (in any labor organization)" in the context of Section 8 (a) (3) embraces the privileges and duties incidental to Union membership including the faithful performance of obligations imposed by a Union upon its members as such, and not merely the formal act of joining or remaining in a Union; and that since the Union's conduct in this case was aimed at compelling obedience to Union rules, the Union's conduct encouraged membership in the sense that it encouraged compliance with membership rules.

Under this view, the Board contends it is immaterial that Fowler was an old Union member and was not, therefore, "encouraged" to *join* the Union. If this Board concept of "membership" be adopted, where do we stop?

We do not consider it necessary to labor the point that when Congress spoke of "encouraging or discouraging membership" it intended to deal with encouragement or discouragement in the well known and commonly accepted sense. It intended to prohibit Unions from improperly encouraging individuals to join their ranks and to prohibit employers from improperly discouraging employees from joining unassisted Unions. It certainly did not intend that when an individual voluntarily elected to join a Union and to be bound by its rules of membership, that the Union was to be restrained from asking that such a member abide by the rules which he had voluntarily elected to honor.

Indeed, Congress clearly indicated a contrary intent when it said in the proviso to Section 8 (b) (1)

"that this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

In apparent recognition of the weakness of its position on this score, the Board and the Court below found it necessary to resort to the effect of the Union's conduct on non-members (R. A. 85). But this argument, aside from its tenuousness, overlooks the question of the propriety of a Union urging, even insisting upon, compliance with its rules by those who elect to be members even if some metaphysical encouragement of membership is engendered thereby. A Union which makes a contribution to a charitable cause with no ulterior motive may thereby encourage some individual to join its ranks. Did Congress intend to proscribe encouragement of Union membership by such means?

The observations of the 8th Circuit in *N. L. R. B. v. Webb Construction Company, supra*, forcefully apply to the facts in this case. Here Fowler had voluntarily assumed the obligations and taken the advantages of membership in the Union. As we shall shortly demonstrate the Union's insistence upon his compliance with the rules by which he had obligated himself to abide, did not constitute "discrimination" within the meaning of the Act. Certainly, such insistence cannot be said to have been motivated by a desire to "encourage membership".

B. The Union was not guilty of "discrimination" within the meaning of the Act in applying to Fowler, as a member of the Union, the same rules which governed all other members of the Union, and the Union did not "restrain or coerce" Fowler in the exercise of his "right to refrain from concerted activities".

The Union rules governing the distribution of work amongst its members have been described *supra*. No question as to the fairness or moral propriety of these rules has been raised. *Per contra* the Trial Examiner found that they were practiced in order to enforce "rules of fair dealing between its members for their mutual benefit". These must, therefore, be distinguished from union rules

of the "indefensible" variety. *Cf. N. L. R. B. v. Elk Lumber Co.*, 91 N. L. R. B. 333.

In the instant case, the denial of clearance was motivated by the twofold purpose of (1) enforcing these rules of fair dealing and, (2) in the February incident, of protesting the wrongful discharge of Kozel, the incumbent Union member, whose services had been satisfactory to the company, and who desired to retain his post.

There is not a word in the record to even indicate that the Union's refusal of clearance was motivated by any activities of Fowler in support of any rival union or in opposition to the union as such, or on any personal ground. Fowler was not *persona non grata* for any reason connected with union or non-union activity during the occurrence of the incidents here involved. The Union's refusal to issue clearance took place not because of Fowler's union activities but rather in spite of them. Had the Union, by its conduct, sanctioned the wrongful discharge of Kozel it would have "discriminated" against Kozel. Had the Union issued clearance to Fowler when another member was entitled thereto it would have favored Fowler only at the price of discriminating against another. Had the union sanctioned conduct of Fowler which would destroy the method of orderly work distribution by which he and all other members of the Union had agreed to abide, it would have been guilty of discrimination against every other member of the Union who did not seek to evade its rules. Yet the Court below held the existence of this intolerable dilemma to be immaterial. We urge that in so holding, the Court below brushed aside the basic test which has always been applied to ascertain whether "discrimination" exists:—"What was the true reason back of the discharge"? *Victor Manufacturing and Gasket Co. v. N. L. R. B.*, 175 F. (2) 867 (C. A. 7).

Further, the Act provides that employees shall have the right "to engage" in concerted activities and shall also

have the right "to refrain" from any or all of such activities "except to the extent that such right may be affected by an agreement requiring membership * * *."

Preliminarily, we point out that Fowler's "right to refrain" was "affected" by the agreement—*e. g.* the provision that nothing contained therein should justify the discharge of a satisfactory radio officer. But more importantly the Act confers the right "to engage" or "to refrain". Now, the activity involved in the instant case dealt with the operation of the hiring hall. It is clear from the findings of the Trial Examiner and the Board that the right "to refrain" which the Board was seeking to protect had to do with the procurement of work through the medium of the Union hiring hall and the rules adopted with respect to the operation thereof.⁸ In short, the Trial Examiner and the Board said that Fowler was free to seek employment directly from the Company without reference to the Union hiring hall.

Hence, applied to this case, the purpose and intent of Section 7 of the Act clearly was to permit Fowler to participate in the operation of the hiring hall if he so desired, or to have nothing to do with that form of concerted activity, if he so desired.

The facts of the case disclosed clearly that Fowler did not choose to divorce himself from participation in the hiring hall. On the contrary, all of his actions indicated a desire to "engage" in this activity. Thus, he insisted that during the February incident "I had no idea of signing articles without obtaining a 'clearance' from the Union" (B. A. 89); his "protest" of Miller's assignment

⁸ Here again the Court below was in error in stating that "the concerted activity in the case at bar was the refusal to take employment with the Company as a means of reprisal against it for discharging KOZEL" (R. A. 84). This conclusion of the Court below as to the concerted activity involved herein is at complete variance with the reasoning of the Board on this subject (B. A. 59, 60).

was predicated upon the ground (albeit mistaken) that he had a prior right under the Union's assignment rules (B. A. 53, R. A. 28); and in the April incident, he bid for the job aboard the S. S. Raphael Semmes in accordance with the Union rules and was actually awarded the clearance for that job based upon the fact that, as the member longest unemployed, interested in the assignment, he was entitled to the clearance (B. A. 99).

Hence, it appears upon analysis that the Union has been found guilty of depriving Fowler of his right "to refrain" when, in fact, he elected "to engage" albeit upon his own terms.

Fowler was free to have nothing to do with the hiring hall, but he chose to utilize its facilities. Indeed, by the use of these facilities, he admittedly received and accepted an assignment in preference to other members. Despite this, it has been found that he was free to take the advantages of "engaging" while at the same time insisting upon the advantages of "refraining".

Thus, the ruling of the Board and the Court below says, not merely that you may play baseball or not, as you may choose, but that if you do elect to play, you may, at any stage of the game, insist on ten strikes while all other players are limited to three. The Board has heretofore held such an interpretation of the "right to engage . . . or to refrain" repugnant to the intent of the Act. In analyzing this problem, in an analogous case of alleged employer unfair labor conduct, the Board in *Elk Lumber Company, supra*, quoted the following language from a decision of the U. S. Court of Appeals for the Eighth Circuit:

"While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid them, and at the same time select

what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." * * *

The Board's Opinion said further:

"Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, both the Board and the courts have recognized that *not every form of activity that falls within the letter of this provision is protected*. The test, as laid down by the Board in the *Harnischfeger Corporation* case, and referred to with apparent approval by the Supreme Court in the recent *Wisconsin* case, is whether the particular activity involved is so 'indefensible' as to warrant the employer in discharging the participating employees. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.

"Here, the objective of the carloaders' concerted activity—to induce the Respondent [company] to increase their hourly rate of pay or to return to the piecework rate—was a lawful one. To achieve this objective, however, they adopted the plan of decreasing their production to the amount they considered adequate for the pay they were then receiving. In effect, this constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms. The courts, in somewhat similar situations, have held that such conduct is justifiable cause for discharge. Thus, in the *Conn* case, the Court of Appeals for the Seventh Circuit found that the employer was justified in discharging employees who refused to work overtime, saying:

'We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.'

And in the *Montgomery Ward* case, in which employees at one of the employer's plants refused to process orders from another plant where a strike was in progress, the Court of Appeals for the Eighth Circuit said:

'It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service, and carefully discharge their duties to the extent reasonably required. * * * Any employee may, of course, be lawfully discharged for disobedience of the employer's directions in breach of his contract. * * * While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work'."

By the same token here, Fowler was free to resign from the Union or to have nothing to do with the Union's hiring hall, but he was no more free to remain a member of the Union and utilize the facilities of the Union's hiring hall upon his own terms than the employees in the above case were free to prescribe the conditions of the jobs which they elected to retain.

Further, the Union's insistence on Fowler's honoring his membership obligations did not constitute "cause" of "discrimination" to "encourage membership". The last proviso of Section 8 (a) (3) of the Act, states: "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable ground for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Here the Union made it clear that its refusal to issue clearance was predicated "on grounds that forcing another member out of employment is strictly against Union By-laws" (B. A. 182, 212). The Union never at any time claimed that Fowler was not in good standing for failure to pay or tender his dues or initiation fees.

POINT IV

The court below erred in judging the Union's rights and obligations by the application of a strict construction of the language of the contract rather than the interpretation thereof by the parties and their actual practices thereunder.

It was undisputed that if a valid hiring hall arrangement was in existence at the times here pertinent the Union's actions were justified and protected by the Act (Sec. 102).

Both the majority of the Board and the majority of the Court below held that the actual practices of the parties was of no moment because of the conclusions reached by them that

- a) The contract clearly and unambiguously negated the hiring hall arrangement;
- b) Even if the contract be deemed ambiguous, in the absence of a clearly expressed hiring hall arrangement, such arrangement would be unavailable as a defense.

In appraising the validity of these conclusions it is of interest to trace the path by which they were reached.

The Trial Examiner restricted the Union in its proof as to the parties' understanding of the contract and their practices thereunder upon the ground that the contract was clear and unambiguous on its face (R. A. 44-45). The Board followed the Trial Examiner in likewise holding that the contract was clear and unambiguous on its face and that the Trial Examiner had, therefore, properly excluded evidence relating to the parties' interpretation of its provisions and to their hiring practices during the period of its existence (B. A. 25). Oddly enough, however,

the Trial Examiner and the Board differed as between themselves as to the meaning of the language which each had found to be clear and unambiguous (B. A. 24 Note 3-25; B. A. 63). The Court below in turn could "find in the record no exclusion of proffered evidence which would have added anything material to the Trial Examiner's findings as to the practices of the parties". (R. A. 83). As a matter of fact the record clearly shows that the Union was restricted in its proof as to the meaning of the word "clearance" which is contained in quotation marks in the contract itself (R. A. 44-46). As a result of the foregoing, the quoted word "clearance" has been subjected to all shades of definition. The Union contended that "clearance" connoted a work assignment issued by the application of the method of selection on a rotating basis as described *supra*, pages 9-10; and that, as shown by Respondent's Exhibits 5, 6, 7, and 8 (R. A. 75-78), a clearance was an assignment of a specific man to a specific ship, acceptance of the assignment being signified by the signature of the recipient of the assignment. The Trial Examiner held in effect that the issuance of a "clearance" was no more than a ministerial act which the Union was required to perform provided only that the requirement of a "membership in good standing" was met (B. A. 63). The Board, in turn, held that the issuance of a "clearance" was intended as a certification by the Union of the good membership status of any employee (B. A. 24). The Court below defined "clearance" as meaning "a written statement of good standing in the Union" (R. A. 79). The Solicitor General in his memorandum on our petition for a writ of certiorari, forced more closely to the inescapable actualities of the situation, defined "clearance" as "a referral from the dispatcher at the Union Hiring Hall" (p. 7, Memorandum for N.L.R.B.).

In their dissents, Board Member Murdock and Judge Clark below held that because of the exclusion of evidence

as to the meaning of "clearance" the precise effect of the contract's hiring provisions could not be determined (R. A. 88); but on the basis of the clear evidence exuded by the record as to the practices of the parties, they reached the conclusion that a hiring hall arrangement existed.

Need we say more to establish the error of the conclusion that the contract was clear and unambiguous on its face?

We turn then to the next question, namely:—the necessity for a clearly expressed written hiring hall arrangement in order that the hiring hall practice be available as a defense. As to this, the Board contended and the Court below held that, even if the contract be deemed ambiguous, since Union security arrangements, such as the hiring hall, are valid only by virtue of the Union shop proviso to Section 8 (a) (3)⁹ the contract cannot come within the statutory exception since its purpose is not expressed in plain and unmistakable terms.

The Union agreed that it was necessary for *the proof* to clearly show the existence of the hiring hall arrangement. The Board contended that this was not enough—and that it was necessary for *the language of the contract* to clearly and unmistakably establish such an arrangement.

In thus advocating a test which exalts form over substance the Board relied on the cases of *N.L.R.B. v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695; *N.L.R.B. v. Don Juan, Inc.* (C. A. 2), 178 Fed. (2nd) 625, 627; and *N.L.R.B. v. Mason Manufacturing Co.* (C. A. 9), 126 F. (2nd) 810, 813.

We urge that in adopting the Board's contention on this score, the Court below misread the teachings of these cases.

⁹ In this case, because of the provisions of Section 102, the closed shop proviso to Section 8 (3) of the Wagner Act is applicable.

Carefully read, it is apparent that these cases stand for the proposition that where a union security provision is invoked as a defense to conduct which would be otherwise discriminatory, there must be "a sufficient showing" of the existence of such a valid union security arrangement; but these cases do not hold that when such a valid security arrangement exists in fact it must be disregarded for defects in form. Indeed, in *N.L.R.B. v. Electric Vacuum Cleaner Co., Inc.* (*supra*), the Board found that a written contract was modified by an *oral* provision pertaining to a closed shop. This Court did not disturb that finding but rather rested its decision on the fact that the Union there involved was an "assisted" one.

So, too, in the cases of *N.L.R.B. v. Don Juan, Inc.* (*supra*), and *N.L.R.B. v. Mason Manufacturing Co.* (*supra*), the Court said that there must be a "sufficient showing" that there was a contract for a closed shop.

It is apparent from a reading of all of these decisions that the requirement of "a sufficient showing" was designed to prevent "discrimination" sought to be accomplished on the basis of a pretext or an afterthought, or by a union which did not qualify as one entitled to enforce such union security provisions. But those considerations have no application here; for in the instant case there was "a sufficient showing" that, in fact, a lawful hiring hall arrangement existed.

The error of which the Board and the Court below were guilty in this case was pointed out in the case of *N.L.R.B. v. Scientific Nutrition Company* (C. A. 9), 180 F. (2nd) 447, where the Court said:

"We are persuaded that this concentration on the terms of the writing led the Board to overlook or disregard material and uncontroverted evidence tending to show that Capolino and Local 22832 had long

understood and administered their contract as requiring membership in the local as a condition of employment." (Italics supplied.)

The contention that strict construction of verbiage is required even where such strict construction is unnecessary to avoid discrimination based on a pretext or afterthought, is all the more surprising when viewed in the light of other recent decisions of the Board which have disregarded form in favor of substance.

Thus in the case of *Boilermakers AFL (Consolidated Western Steel Corporation)*, 94 N.L.R.B. 1590, the Board said: "On its *face* the hiring clause appears to be *lawful*" * * * yet "This hiring *procedure*, involving preference in hiring to union members, is *unlawful*." (Italics supplied.)

Indeed, ironically, the Board has recently held that a *clearly expressed unlawful closed shop provision* was not violative of 8 (a) (3) and 8 (b) (2) because of "the absence of an *intention* to enforce it." *Port Chester Electrical Construction Corp.*, 97 N.L.R.B. No. 59.

Fairly read, the record in the instant case leaves no doubt that a lawful hiring hall arrangement existed in fact and that its practice by the parties was unquestionably *ante litem motam*. The administration of such a hiring hall arrangement was lawful under the Wagner Act, and the lawful continuation thereof for a period of one year was expressly authorized by Section 102 of the Act.

Under these circumstances, the use of a rule of strict construction, adopted by our courts to prevent injustice, should not be invoked to produce injustice.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be reversed and enforcement of the Board's order should be denied.

Respectfully submitted,

ABNER H. SILVERMAN,
EMANUEL BUTLER,
ALEXANDER C. RUSSOTO,
401 Broadway,
New York 13, New York,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

Counsel for Petitioner.

FILE COPY

Office - Supreme Court, U.S.

FILED

JAN 15 1953

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~230~~ 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR PETITIONER

✓ HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

✓
ABNER H. SILVERMAN,
✓ EMANUEL BUTTER,
NO { ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, N. Y.,
Counsel for Petitioner.

BLEED THROUGH- POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 230

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR PETITIONER

I

The Board's position on the paramount substantive question herein involved is summarized at pages 43-44 of its brief, as follows:

And while the amended Act permits a union to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that the union is forbidden to exercise control over employment for the purpose of enforcing any aspect of its membership policy other than to compel dues payment through a union security agreement. *Id.*, pp. 22-25.

The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

When read in conjunction with its brief in *Teamsters*, this means that no control or interference may be exercised even when a man has *agreed* to such control either by contract vis-a-vis his Union or by contract vis-a-vis his employer. The Board recognizes no distinction between the case of a man who wishes to abstain from joining a union and one who voluntarily elects to join. Furthermore, the Board's concept would seem to mean that when union policy conflicts with the desire of an individual member to refrain from participating therein, union policy must be subordinated. If the Board be upheld in this view, it will, while professing to aim only at "discrimination", be striking a mortal blow at every form of order, system, or discipline which may be adopted by a union for the governance of its members; and the rights which the Board vouchsafes to a union "to adopt and pursue any membership policy * * * to exert any internal union discipline it desires * * * to deny or terminate membership * * *" (*Id.*, pp. 1-2) become empty and meaningless phrases.

We urge that where a union has lawfully adopted a policy—where for example it has agreed with its members and an employer as to the method by which it shall implement the formalization of a hiring (in this case, by issuing a clearance)—it has the right to lay down reasonable and equitable rules for the orderly handling of such procedures.

It has this right no less than an employer has the right to require that all applicants for employment shall make their applications through the personnel office rather than to the president of the company. It has the right, no less than an employer, to say that jobs shall be filled on a first-come first-served basis—so long as this policy is carried out with no intent to favor a union man over a non-union man.

The Board, on the other hand, insists that if a union attempts to enforce such policies and rules, it is guilty of "discrimination", and that such "discrimination" inherently "encourages membership."

We urge that Congress intended no such destruction of the machinery of collective bargaining. The principles of mutual restraint and forbearance permeate the "declarations of policy" contained in the Act; and when the Act is read as a whole, it is apparent that Congress evinced no intent to destroy the right of a man voluntarily to undertake and accept the advantages and obligations of Union membership.

It is because of the Board's misconception on this score that the Board persists in the position (Board's brief, p. 35) that Fowler was *refusing* "to cooperate with the Union in its (hiring hall) program" and that this constituted "an exercise of the right to refrain". Not a word is said in answer to our contention that Fowler's conduct evinced an intent to "*engage*", albeit upon his own terms, rather than to "*refrain*".

The scheme of the act obviously is that membership in a Union shall be made available to employees desirous of joining or retaining membership "on the same terms and conditions generally applicable to other members" Section 8(a)(3). It was not intended that membership must be made available on such terms and conditions as the individual member may himself choose to enforce or live up to.

The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

When read in conjunction with its brief in *Teamsters*, this means that no control or interference may be exercised even when a man has *agreed* to such control either by contract vis-a-vis his Union or by contract vis-a-vis his employer. The Board recognizes no distinction between the case of a man who wishes to abstain from joining a union and one who voluntarily elects to join. Furthermore, the Board's concept would seem to mean that when union policy conflicts with the desire of an individual member to refrain from participating therein, union policy must be subordinated. If the Board be upheld in this view, it will, while professing to aim only at "discrimination", be striking a mortal blow at every form of order, system, or discipline which may be adopted by a union for the governance of its members; and the rights which the Board vouchsafes to a union "to adopt and pursue any membership policy * * * to exert any internal union discipline it desires * * * to deny or terminate membership * * *" (*Id.*, pp. 1-2) become empty and meaningless phrases.

We urge that where a union has lawfully adopted a policy—where for example it has agreed with its members and an employer as to the method by which it shall implement the formalization of a hiring (in this case, by issuing a clearance)—it has the right to lay down reasonable and equitable rules for the orderly handling of such procedures.

It has this right no less than an employer has the right to require that all applicants for employment shall make their applications through the personnel office rather than to the president of the company. It has the right, no less than an employer, to say that jobs shall be filled on a first-come first-served basis—so long as this policy is carried out with no intent to favor a union man over a non-union man.

The Board, on the other hand, insists that if a union attempts to enforce such policies and rules, it is guilty of "discrimination", and that such "discrimination" inherently "encourages membership."

We urge that Congress intended no such destruction of the machinery of collective bargaining. The principles of mutual restraint and forbearance permeate the "declarations of policy" contained in the Act; and when the Act is read as a whole, it is apparent that Congress evinced no intent to destroy the right of a man voluntarily to undertake and accept the advantages and obligations of Union membership.

It is because of the Board's misconception on this score that the Board persists in the position (Board's brief, p. 35) that Fowler was *refusing* "to cooperate with the Union in its (hiring hall) program" and that this constituted "an exercise of the right to refrain". Not a word is said in answer to our contention that Fowler's conduct evinced an intent to "*engage*", albeit upon his own terms, rather than to "*refrain*".

The scheme of the act obviously is that membership in a Union shall be made available to employees desirous of joining or retaining membership "on the same terms and conditions generally applicable to other members" Section 8(a)(3). It was not intended that membership must be made available on such terms and conditions as the individual member may himself choose to enforce or live up to.

In its attempt to becloud this point the Board refers to the rules governing the issuance of clearance as "unwritten" (Board's brief, p. 39), and elsewhere it implies that the clearance system was some arbitrary device employed by the Union to impose dictatorial control. But there can be no doubt whatever from the record that Fowler well understood the rules relating to the issuance of clearance, that his understanding was in complete conformity with the Union's contentions relating thereto, and that he elected to participate therein. No further demonstration of this fact is required than to remind this Court of the fact that Fowler's "protest" of Miller's assignment to the S. S. Frances was predicated upon the fact, though mistaken, that Fowler believed himself to have been longer unemployed than was Miller.

The Board further asserts (Board's brief, p. 37, Note 15), that there is "little factual support" for the claim that the Union's conduct was motivated by Kozel's right to retain his job. We urge that the record clearly belies this contention, and indeed the Trial Examiner and the Board clearly held that the Union was motivated by this consideration (B. A. 59). This turn about in the position of the Board on this subject is obviously inspired by the Board's recognition of the error of the Court below in holding this factor to be immaterial; and its attempt to bolster the position of the Court below in holding this factor to be immaterial should not go unnoticed.

The Board argues further (Board's brief, p. 39) that the Union's sole means of enforcing its membership rules was to divest Fowler of his status as a member in good standing, whereupon it properly could have denied him *any* employment with any of the companies covered by the contract in accordance with the agreement. But, argues the Board, the Union, while free to expel or suspend Fowler for his conduct, was unable to suspend his good standing to the limited extent of depriving him of a specific

job aboard a specific ship. It is strange logic, indeed, which leads to the conclusion that the part is greater than the whole.

Moreover, the Board argues that a member's default in the performance of his membership obligation is meaningless "if the default is not *translated*¹ by the Union into loss of membership in good standing"—the implication being that the test of "loss of good standing" is dependent upon the degree of formalism by which such loss of good standing is accomplished; and the Board argues further that it matters not how inequitable may be the rule under which a member loses his good standing, provided only that formalism be observed (Board's brief, p. 39). This means that you may "penalize" a member inequitably if you do so with formality; but you may not "penalize" on clearly equitable grounds if you are not scrupulously careful in following formalities.² Our notions of basic justice are outraged by such reasoning.

The troublesome implications above indicated are engendered by the Board's loose usage of the word "discrimination". It fails to recognize the need to probe *circumstance* and *motive* to ascertain the existence or non-existence of "discrimination". A man who is sent by an officer to the back of a line of people waiting to buy tickets to a baseball game is not "discriminated" against when the purpose is to maintain order and prevent

¹ It seems that this "translation" must comport with the Board's views upon the union procedure by which the "translation" is accomplished (B. A. 49-50, 62).

² The Board's view seems to preclude the possibility that a member who clearly violates his union obligations may, upon such violation, instantly cease to be in "good standing", at least for certain purposes.

Query: Is a man in good standing for purposes of attending a union meeting when he is boisterously intoxicated; or must a union go through the formality of suspending him before excluding him from the meeting room?

physical injury—although such a man admittedly is deprived of the right to buy his ticket precisely at the moment he desires. Furthermore, the lack of “discrimination” under these circumstances is not altered even if we add to our assumption the further fact that the officer, honestly misreading his orders, has called for the formation of a single rather than a double line.³ On the other hand, a man who properly reaches his turn at the head of the line and is singled out to be sent to the back of the line because the officer on duty does not like the cut of his coat is a victim of “discrimination”.

II

a) In seeking to sustain the propriety of its back pay award, the Board cites only its own decisions in *Pen & Pencil Workers*, 91 NLRB 883, and *Quinley*, 92 NLRB 877. It urges that its power to order back pay without reinstatement as illustrated in certain employer cases (Board’s brief, p. 56, Note 24) establishes a rule which is applicable here. Here again the fallacy of the Board’s reasoning becomes apparent upon analysis. Thus it argues that since back pay without reinstatement has been found proper in certain employer cases where necessity and reason left no other choice (see examples cited in Board’s brief page 60) that a general, *carte blanche* rule is inferrable therefrom. In each of those cases, however, it is clear that reinstatement *could* and *would* have been ordered save for the circumstances which there existed making such a direction inappropriate. Hence, it may fairly be said that reinstatement *was* constructively ordered in each of those cases. In the instant case, *per contra*, had the employer been joined, no consideration of

³ Certainly there can be no doubt that the Union here had at least *colorable* justification for its interpretation of the contract and the “clearance” provisions thereof.

necessity and reason would preclude reinstatement. On the contrary, it is safe to assert that no order could or would have been made sustaining the charge *without* ordering reinstatement.

The Board argues further that the phrase "where an order directs reinstatement" in the proviso to Section 10 (c) is merely "illustrative language" and it would have this Court treat that phrase as mere "casual description". But the Board does not trouble to apprise the Court of the fact that in the case of *NLRB v. J. I. Case*, 198 F. (2d) 919, on which it relies (Brief, p. 58) the reference to "casual description" dealt with the word "*discrimination*" in the proviso to Section 10(c) and not with the phrase here involved. Its contention that the phrase "where an order directs reinstatement" may be treated as "illustrative language" overlooks the fact that this illustrative language was already in the statute. The identical phrase appears in Section 10(c) immediately before the proviso here involved. Hence the repetition of this language in the proviso was wholly unnecessary for illustrative purposes, especially in the light of settled law as to its meaning under the Wagner Act. We do not believe that this Court will agree that Congress purposelessly *repeated* illustrative language in a proviso.*

The words may have been "illustrative language" when originally incorporated in the Wagner Act but certainly

* The fundamental principle that such a proviso must be strictly construed and that one seeking to come within a proviso to a statute must comply strictly *with the words as well as the reason* for the proviso has been enunciated by the courts. See, e. g., *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741; *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 105 F. 2d, 667, 674 (C. A. 3), certiorari denied, 308 U. S. 625; *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52, 56 (C. A. 8); *U. S. v. Dickson*, 40 U. S. 141, 165; *Canadian Pac. Ry. Co. v. U. S.*, 73 F. 2d 831, 834 (C. A. 9); *Rochester Telephone Corporation v. U. S.*, 23 F. 2d Supp. 634, 636 (W. D. N. Y.), aff'd 307 U. S. 125; *Spokane & Inland R. R. v. U. S.*, 241 U. S. 344, 350.

their repetition in the proviso—wholly unnecessarily unless meaningful—must be considered “an injected limitation.” In this connection, note too, that in the case of a mere “attempt”, back pay would not be involved.

(b) The Board claims (Board’s brief, p. 54) that the question of the propriety of a back pay award without a reinstatement provision under the proviso to Section 10 (c) was not raised before the Board or the Court below. We urge that it was raised before the Board in our exceptions, and in our brief in support of our exceptions (pp. 35, 36, 39, 27 and 32). It was also raised in our brief in the Court below (pp. 39 to 41). Moreover, there can be no doubt that it was raised in our petition for the writ (pp. 19 and 20) and the Board did not then even suggest that the point had not been raised below. (See p. 18, Note 13, NLRB brief in opposition to the petition for the writ.)

III

On the question presented by its failure to join the employer, the Board argues (Board’s brief, p. 53) that since a private plaintiff may select one of several *tort feorsors*, the Board has the same prerogative “in the absence of compelling circumstances not here suggested.” Here again, the Board overlooks the public nature of its duty to effectuate the purposes of the Act and the “compelling reasons” for proceeding against employer and labor organization alike, which it has itself enunciated in *Newman*, 85 NLRB 725. Further, citing only its own decision in *Quinley*, 92 NLRB 877, the Board argues that the Court may not intrude upon the undisclosed reasons which may prompt the General Counsel to select one and omit another party. We are confident that this Court will not agree that it should abdicate before arbitrary agency action which results in the destruction of Congressional intent. *Norton v. Warner Company*, 321 U. S. 565; *Dobson*

v. Commissioner, 320 U. S. 489; *Gray v. Powell*, 314 U. S. 402; *Shields v. Utah Idaho & Central R. R.*, 305 U. S. 177; *A. F. L. v. Labor Board*, 308 U. S. 401, 412; *U. S. v. Griffin*, 303 U. S. 226, 238 and *Shannahan v. U. S.*, 303 U. S. 596, 603.

In further attempting to justify its failure to join the employer, the Board now argues for the first time (Board's brief, p. 51) that since the Board did not issue its complaint until after the six month period had elapsed, no charge could be levelled against the Company; and that since the result of dismissing the complaint would have been to have the discrimination go completely unremedied, it was correct in proceeding against the Union alone.

This is tantamount to arguing not merely that the Union must abide the consequences of the Board's delay in issuing the complaint but further that the charging party should not be required to take the consequences of the form of the charge which he elected to file. The charge, signed by Fowler, clearly specified (B. A. 8) that the Union caused A. H. Bull Steamship Company to discriminate against him in violation of the Act. Hence, Fowler's deliberate refusal to level his charge against the employer was an election on his part, the consequences of which he must take. From the point of view of the enforcement of the public rights involved, we maintain that it were better that the case be dismissed than have it proceed against the Union alone. *Newman*, 85 NLRB 725. The situation would then be no different than that which prevails in countless cases which are not processed at all because of the six month limitation contained in the statute. The failure to proceed at all, under the circumstances here involved, would be an undue hardship only if the case be viewed as a private matter—and as a private matter, Fowler must be held to the consequences of his election.

IV

Upon the "free speech" question:

The Board refuses to recognize that while instigation may be sufficient to "induce or encourage" that it requires something more than instigation to "restrain or coerce", for as this Court has pointed out, it is the *objective* and not the quality of the means which is controlling in a secondary boycott case—not so, in the case of "restraint or coercion".

Contrary to the holding in *NLRB v. Denver Building* 341 U. S. 943 and *NLRB v. IBEW*, 181 F. 2d, 39, the Union's protest of Kozel's discharge and its refusal to issue clearance was not a signal "tantamount to a direction to strike", nor was it "bare instigation" as was the "unfair" sign; and this Court may well recall Judge Hand's injunction against restraining speech which falls within even "the ambivalent area". *NLRB v. IBEW*, *supra*.

Respectfully submitted,

HERBERT S. THATCHER,
736 Bowen Building,
Washington 5, D. C.

ABNER H. SILVERMAN,
EMANUEL BUTTER,
ALEXANDER C. RUSSOTTO,
401 Broadway,
New York 13, N. Y.,
Counsel for Petitioner.

BLURRED COPY

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement:	
A. The Board's findings of fact and conclusions of law ..	3
1. As to the hiring contract between the parties ..	3
2. As to the discrimination against Fowler, the charging party	6
B. The decision of the court below	10
Discussion	11
Conclusion	22

CITATIONS

Cases:

<i>In re Chicago & E. I. Ry. Co.</i> , 94 F. 2d 296	20
<i>Consumers Power Co. v. National Labor Relations Board</i> , 113 F. 2d 38	16
<i>General Motors Corp.</i> , 49 NLRB 1143, enforced per curiam, 150 F. 2d 201	14
<i>Hartford Electric Light Co. v. Federal Power Commis- sion</i> , 131 F. 2d 953, certiorari denied, 319 U. S. 741 ..	21
<i>Indianapolis Power & Light Co. v. National Labor Rela- tions Board</i> , 122 F. 2d 757, certiorari denied, 315 U. S. 804	18
<i>International Brotherhood of Electrical Workers v. Na- tional Labor Relations Board</i> , 181 F. 2d 34, affirmed, 341 U.S. 694	19
<i>Katz d/b/a Lee's Department Store v. National Labor Relations Board</i> , 196 F. 2d 411	17
<i>National Labor Relations Board v. Don Juan, Inc.</i> , 178 F. 2d 625	21
<i>National Labor Relations Board v. Gaynor News, Inc.</i> , 30 LRRM 2340 (C.A. 2, decided June 24, 1952)	14
<i>National Labor Relations Board v. International Brother- hood of Teamsters, etc.</i> , 196 F. 2d 1, rehearing denied, June 2, 1952	12, 14, 15
<i>National Labor Relations Board v. National Maritime Union</i> , 175 F. 2d 686, certiorari denied, 335 U. S. 954 ..	19
<i>National Labor Relations Board v. Newspaper & Mail Deliverers' Union</i> , 192 F. 2d 654	17
<i>National Labor Relations Board v. Nu-Car Carriers, Inc.</i> , 189 F. 2d 756, certiorari denied, 342 U. S. 919	19
<i>National Labor Relations Board v. Potlach Forests, Inc.</i> , 189 F. 2d 82	13

Cases—Continued

	Page
<i>National Labor Relations Board v. Reliable Newspaper Delivery, Inc.</i> , 187 F. 2d 547	14
<i>National Labor Relations Board v. Scientific Nutrition Corp.</i> , 180 F. 2d 447	21
<i>National Labor Relations Board v. Walt Disney Productions</i> , 146 F. 2d 44, certiorari denied, 324 U. S. 877	12
<i>National Labor Relations Board v. Webb Construction Co.</i> , 196 F. 2d 702	14
<i>National Labor Relations Board v. Winona Textile Mills</i> , 160 F. 2d 201	13
<i>National Union of Marine Cooks and Stewards</i> , 92 NLRB 877	17
<i>H. M. Newman</i> , 85 NLRB 725	17
<i>Phelps Dodge Corp. v. National Labor Relations Board</i> 113 F. 2d 202, affirmed, 313 U. S. 177	18
<i>Phillips Co. v. Walling</i> , 324 U. S. 490	21
<i>Progressive Mine Workers v. National Labor Relations Board</i> , 187 F. 2d 298, amended opinion, March 20, 1951, 27 LRRM 2334	18
<i>Reliance Manufacturing Co. v. National Labor Relations Board</i> , 125 F. 2d 311	18
<i>Republic Aviation Corp. v. National Labor Relations Board and National Labor Relations Board v. LeTourneau Company of Georgia</i> , 324 U. S. 793	15
<i>South Atlantic Steamship Co. v. National Labor Relations Board</i> , 116 F. 2d 480, certiorari denied, 313 U.S. 582	20
<i>Union Starch & Refining Co. v. National Labor Relations Board</i> , 186 F. 2d 1008	17, 18
<i>Western Cartridge Co. v. National Labor Relations Board</i> , 139 F. 2d 855	13

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, et seq.):	
Section 7	9
Section 8 (a) (3)	2, 11, 16, 21
Section 8 (b) (1) (A)	9
Section 8 (b) (2)	2, 16, 17
Section 8 (c)	2, 18
Section 10 (b)	16
Section 10 (c)	18
Section 102	21

Miscellaneous:

Williston on Contracts, Rev. Ed., Sec. 623, pp. 1793-1794.	20
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 230

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. A. 78-90) is reported at 196 F. 2d 960. The findings of fact, conclusions of law, and order of the Board (B. A. 22-75), are reported at 93 NLRB 1523.¹

¹ For purposes of this Memorandum, the printed record before this Court consists of two separately paginated volumes: the Appendix to petitioner's brief in the court below, herein designated "R.A." (the symbol employed by petitioner) and the Appendix to the Board's brief in the court below, designated "B.A." The proceedings in the court below are bound with and paginated continuously from the end of the Appendix to petitioner's brief. Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The decree of the Court of Appeals (R. A. 90-93) was entered on May 22, 1952. The petition for a writ of certiorari was filed on July 28, 1952. The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3)." The first question presented is whether, where a union is charged with violating Section 8 (b) (2), the Board may proceed against the union alone without joining the employer, against whom no charge was filed.

2. Whether a union's discriminatory refusal to grant an employee clearance for employment constitutes expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.

3. Whether, when an employer discriminates against a union member by denying him employment because of the employee's failure or refusal to perform an obligation of union membership, a violation of Section 8 (a) (3) is established without independent proof that the discrimination "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the union.

4. Whether the terms of the union-security agreement, which petitioner invoked to justify the

discriminatory denial of employment to an employee, required the employer to hire only employees initially selected by the Union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the Petition (Pet., pp. 10-15).

STATEMENT

A. The Board's Findings of Fact and Conclusions of Law

This proceeding is founded upon a charge filed by Willard Christian Fowler against petitioner, the Radio Officers' Union (AFL) (hereinafter designated the Union), alleging that it caused an employer, the Bull Steamship Company (herein called the Company), discriminatorily to refuse him employment.² Following the usual proceedings under Section 10 (c) of the Act, the Board issued its findings of fact, conclusions of law, and order on April 18, 1951 (B. A. 22-75). The pertinent findings of fact and conclusions of law made by the Board may be summarized as follows:

1. *As to the hiring contract between the parties*

The transactions giving rise to this case took place in the early months of 1948. At that time, the Union held a collective bargaining contract with a number of steamship concerns, one of which was the Bull Steamship Company (B. A. 44-45; 215-

² No charge was filed against the Company (B. A. 78).

216). The contract, which covered the employment of radio officers on ships of the contracting companies, by its terms required the employers "to select * * * members of the Union in good standing, when available," for employment as radio officers; and it provided (*ibid.*)

when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

However, the contract also expressly reserved to the Company "the right of free selection of all its Radio Officers," and it did not require the Company to leave the selection of its radio officers to the Union (*ibid.*)³

Though free under the contract to hire any union operator they chose, the companies usually left their choice of radio officers in the hands of the Union. On occasion, however, the companies exercised their contractual right of "free selection" and made their own choice of radio personnel (B. A. 46; 167-168, 81, 204, 82, 90, 138-139). When vacancies

³ The validity of the union-security provisions of the contract, which was negotiated prior to the effective date of the 1947 amendments to the Act, was preserved by Section 102 (R. A. 14-15).

occurred, the employers would either call upon the Union to furnish an unemployed member from its shipping list, or would name the man they wished to hire. The Union, depending upon the type of request, would either dispatch an unemployed member of its own selection for the post or would refer the member specified by the employer, furnishing him with a written "clearance" (B. A. 45-46; 150, 151-153, 163-165, 167-168, 174-176, 177-178, 193-194, R. A. 35, 64, 77). It was the Union's policy and unwritten rule that members desiring employment should apply for work at the union hall and there await their turn to be dispatched to a job. (B. A. 45-46, 59; 150, 151-153, 127, 163-165, 167, 174-175, 178, 193-194). The Union frowned upon the practice of the companies' exercising their contractual right to name their choice of radio officers. According to the Union's general secretary-treasurer, Fred M. Howe, "some of the members don't think too much of that system" (B. A. 57-58; 167-168). Over the years, the Union came to consider it an offense for a member to solicit or accept an offer of employment directly from a company; this offense was deemed particularly serious when acceptance of such an offer would result in the "bumping" of a fellow member (B. A. 48-49, 59-60; 167-168, 116-117, 89, 154-155, 85, 205, 158-159, 210, 160-161).

In the proceedings below, the Union contended that the aforesaid agreement, as implemented by the practice of the parties, obligated the employers and their prospective employees to conform to hiring hall procedure and that the Union, accordingly,

could rightfully refuse to "clear" an employee for a position, even though he was a union member "in good standing," if he had dealt directly with the employer about the prospective job, without prior recourse to the Union's hiring hall. The Board rejected this contention and found that the contract clearly reserved to an employer the right to hire radio officers of its own choosing, provided only that any prospective employee be a "member" of the Union "in good standing" (B. A. 23-25, 58, 61-63).⁴

2. As to the discrimination against Fowler, the charging party

Fowler, an old employee of the Company (B. A. 46; 80), was a long-time member of the Union and at all times herein material was "in good standing" (B. A. 46; 172, 86-87, 93-95, 206-209). On February 24, 1948, at his home in Miami, Florida, he received a telegram from Robert H. Frey, the Company's radio supervisor, summoning him to New York City for immediate assignment to a job on the Company's ship *S. S. Frances* (B. A. 47; 81, 204, 132, 133). Fowler at once notified the Company that he would accept the job.

That same day in New York, supervisor Frey notified the incumbent radio officer on the *Frances*, a union member named Kozel, that he was to be replaced by "a man with senior service in the company" (B. A. 46; 143). On the 25th, Fowler came to New York to take up his new assignment. He

⁴ Member Murdock dissented on this point (B. A. 31-34).

went to the Union headquarters but was unable to see Secretary Howe, who was busy at the time (B. A. 47; 82-83, 115). From there, Fowler went to the *S. S. Frances* where he met Kozel, the radio officer on the preceding voyage (B. A. 46-57; 83, 87, 121, 133-134). Kozel asked Fowler if he had been cleared. Fowler replied in the negative but explained that he did not know there was a radio officer aboard, and suggested that Kozel straighten out the matter with the Union (B. A. 47; 83-84). Kozel reported Fowler's appearance on the ship to the Union that day (R. A. 53). On February 27, Howe, acting without authority and in disregard of the disciplinary procedures prescribed in the Union's by-laws (B. A. 26, 62; 157, 160-162, 210), wired Fowler that he had been suspended from membership in the Union for bumping another member (B. A. 47-48; 85, 205).⁵

On February 28, and again on March 1, Fowler spoke to Howe concerning the suspension telegram and expressly requested clearance for the *S. S. Frances* (B. A. 52; 88-90). Howe refused the request, asserting that Fowler had violated the Union's rules by failing to obtain "clearance" (*i.e.*, a referral from the dispatcher at the Union's hiring hall) before arranging for the position with Frey, and by "trying to steal jobs from other members" (B. A. 52-53; 89-92, 127-128). Howe declared that the Union would never again clear Fowler for a

⁵ The trial examiner, the Board, and the court below agreed that the suspension was null and void and found that Fowler remained in good standing as a Union member throughout this period. Petitioner no longer challenges this finding.

position with the Company, but suggested that Fowler might take other jobs which the Union had at its disposal (B. A. 52-53; 90, 92). Fowler elected, instead, to return to his home in Florida for the time being (B. A. 92). Unable to obtain a "clearance" for Fowler, the Company gave the job on the *Frances* to another man who was dispatched by the Union (B. A. 52-53; 137).

On April 22, Fowler returned to New York City and, again, first advised the Company that he was available for work before he reported to the Union (B. A. 54; 95-96, 138). On April 25, Fowler went to the Union hall and told Howe, in effect, that he was looking for a job. Howe told him, "We have plenty of jobs available for you but it still stands as far as the Bull line is concerned, you will be given no clearance for any Bull Line ship" (B. A. 54-55; 96-97, 123-124). He added that supervisor Frey had been "making a company stiff" out of Fowler and that he, Howe, intended "to break it up here and now" (B. A. 54-55; 97), overruling Fowler's protest that nothing in the Union's constitution and by-laws precluded him from working for the Company or any other employer he might prefer (B. A. 54; 124). Two days later, a job opened on the Company's ship *S.S. Evelyn*. Frey asked Howe to clear Fowler for the job, but Howe, adhering to his previously announced position, refused to issue the requested clearance. Frey thereupon hired another man dispatched by the Union (B. A. 56-57; 139-140, 141, 148, 202).

On May 1, Fowler had a final interview with Howe in which the Union official censured him for

renewing his contacts with Frey and again accused him of trying to "steal jobs" from fellow members of the Union. When Fowler retorted that Howe appeared to be trying to "railroad" him out of the Union, Howe said, "as far as I am concerned you are through," and suggested that Fowler seek membership in the rival American Communications Association if he desired a job (B. A. 56-57; 102-103, 110, 129, 131).

On the foregoing facts, the Board found (B. A. 23-28, 65-68) that the Union, by refusing to "clear" Fowler in both February and April, 1948, caused the Company to discriminate against him by denying him employment. The Board found that this discrimination, based on Fowler's alleged disloyalty and infraction of the Union's rules, tended to "encourage * * * membership in [a] labor organization" (Section 8 (a) (3) of the Act), even though Fowler himself was already a member of the Union, in the sense that it was "aimed at compelling obedience to union rules" (B. A. 28). Therefore, the Board concluded, the discrimination against Fowler was proscribed by Section 8 (a) (3) of the Act, and the Union, by causing the Company so to discriminate violated Section 8 (b) (2). The Board concluded further (B. A. 59-65, 28), that Fowler had the right under Section 7 of the Act to refrain from observance of the Union's rules because such observance was a form of concerted activity, and hence, as the Union restrained and coerced Fowler (by causing him to lose employment) in his exercise of this statutory right, it violated Section 8(b) (1) (A) of the Act as well as Section

8 (b) (2).⁶ The Board rejected (B. A. 23) the Union's contention that the collective bargaining contract immunized its conduct, because the contract, as explained above, only made union membership "in good standing"—a condition which was met in Fowler's case—a prerequisite to the employment of radio officers, and did not, in addition, require conformity with the Union's hiring-hall rules and procedures.

B. The Decision of the Court Below

The court below affirmed the Board's findings and conclusions and enforced the Board's order in full. In its opinion the court expressly agreed with the Board's conclusion that the collective bargaining contract afforded the Union no defense (R. A. 80-83). The court also agreed that the Union-caused discrimination against Fowler, even though Fowler was a member of the Union at the time, had the effect of encouraging "membership" in the Union. In this connection, the court observed that the discrimination "displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members" (R. A. 85).⁷

⁶ Petitioner's only challenge to this conclusion, embodied in Question 2 (Pet., pp. 7, 21), is that its refusal to clear Fowler for employment constituted, not restraint or coercion, but a legitimate expression of opinion. This contention is discussed *infra*, pp. 18-19.

⁷ Although Judge Clark dissented (R. A. 86) with respect to the construction of the contract, being of the view that the contract did provide for a hiring hall, he did not disagree with the conclusion of the Board and the court below on the basic question presented here, whether, absent such a contract, the Union's conduct violated Section 8 (b) (2).

DISCUSSION

1. Section 8 (a) (3) of the Act, which also defines the union unfair labor practice proscribed in Section 8 (b) (2), makes it unlawful for an employer by discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization * * *

Petitioner contends, in effect, that the Board and the court below misapplied the phrase "encourage * * * membership" in this case (Pet., pp. 7, 21-24).

The court below, in agreement with the Board, considers that the term "membership [in any labor organization]," in the context of Section 8 (a) (3), embraces the privileges and duties incidental to union membership, including the faithful performance of obligations imposed by a union upon its members as such and not merely the formal act of joining or remaining in a union. Accordingly, the Board and the court below held that "membership" in the Union herein was palpably encouraged by the discrimination against Fowler, since the discrimination was based on Fowler's alleged breach of obligations flowing from his status as a Union member and was "aimed," in the Board's words, "at compelling obedience to union rules" (B.A. 28), which is certainly an important aspect of membership. Under this view, it is immaterial that Fowler was an old Union member and therefore, obviously, not himself "encouraged" to *join* the Union, for mere enrollment on a union's roster is not the definitive test of "membership"

standing. The Union's conduct would "encourage" other persons to comply with Union requirements for members. A similar non-restrictive application of the key word "membership" was judicially approved in *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 49, certiorari denied, 324 U.S. 877, where the Ninth Circuit assimilated "membership in a labor union" to taking an "active part in union affairs" and held that to discourage one was to discourage the other.

However, in *National Labor Relations Board v. International Brotherhood of Teamsters, etc.*, 196 F. 2d 1, decided April 29, 1952, rehearing denied June 2, 1952, the Court of Appeals for the Eighth Circuit rejected the Board's concept of encouraging membership. In that case an employee was deprived of his seniority and consequently lost employment because he had broken a union by-law by failing to pay his union dues on time. There, as in this case, the Board held that the discrimination necessarily tended to encourage union membership in the statutory sense, even though the employee immediately affected was himself a long-time member of the union. The Court of Appeals reversed the Board, and ruled that no violation of Section 8 (a)(3) was established because the employee himself was already a union member, and the record did not permit an inference that any other employees' "adhesion to membership" (196 F. 2d at 4) in the union had been encouraged by the discrimination. Thus the Eighth Circuit apparently believes that mere "adhesion," or enrollment upon a union's register of members,

is the limit of the term "membership in [a] labor organization" and that "membership" is not encouraged unless one or more employees are demonstrably influenced to join a union or permit their names to stay on its rolls. We agree with petitioner that this decision conflicts squarely with the decision below.⁸

The Second and the Eighth Circuits disagree, in these two cases, not only as to the meaning of "membership" in the statutory phrase "to encourage or discourage membership," but also as to the corollary question whether, given discrimination in employment *based on* union membership or activity (or want thereof), the Board may infer, without more, that the necessary effect of the discrimination was to "encourage or discourage" membership in the union. As petitioner correctly asserts (Pet., p. 22), the court below held that this proscribed effect is "inherent" in such a case, pointing out that job discrimination against a union member because he has violated the union's code of loyalty is a display of the union's power which is bound to impress

⁸ Petitioner also claims (Pet., pp. 3, 23-24) that the decision below conflicts with decisions of the Seventh, Eighth and Ninth Circuits in *Western Cartridge Co. v. National Labor Relations Board*, 139 F. 2d 855 (C.A. 7); *National Labor Relations Board v. Winona Textile Mills*, 160 F. 2d 201 (C.A. 8); and *National Labor Relations Board v. Potlach Forests, Inc.*, 189 F. 2d 82 (C.A. 9). Those cases, however, are inapposite, for none of them involved the issue presented here. In the *Winona* and *Potlach* cases the crucial question was whether there was "discrimination" based on union membership or activity, within the meaning of Section 8 (a) (3), and Section 8 (3) of the Wagner Act. In the *Western Cartridge* case the Seventh Circuit held that discrimination based upon employees' engaging in a "wildcat" strike did not serve to discourage membership in the particular union which "had nothing to do with the strike" (139 F. 2d 855, 859, 860-861).

non-members (R.A. 84-85). The Eighth Circuit, on the other hand, held in the *Teamsters* case that the efficacy of the discriminatory practice to "encourage or discourage" union membership must be independently proved by substantial evidence, even assuming—or, at least, not expressly denying—that the reason for the discrimination there was union membership or some aspect or quality of union membership.⁹

Thus the Second Circuit, endorsing the Board's own long-standing view,¹⁰ holds that (1) discrimi-

⁹ Although based in part on other grounds, the decisions of the Third and Eighth Circuits in *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C.A. 3) and *National Labor Relations Board v. Webb Construction Company*, 196 F. 2d 702 (C.A. 8), also adopt this position in principle, and to that extent they, too, are contrary to the decision below and to the Second Circuit's later decision in *National Labor Relations Board v. Gaynor News, Inc.*, 30 LRRM 2340 (C.A. 2, June 24, 1952). However, none of those three cases turned on the precise question presented here and in the *Teamsters* case, namely, whether discrimination against union members for violation of union rules necessarily results in encouragement of "membership" in the union. The question as to which the Second and Third Circuits disagreed in *Reliable* and *Gaynor* is whether the Board may infer that union membership is "encouraged" where the employer gives more favorable treatment to union members than to employees who are excluded from the union and unable to gain admission in the foreseeable future because its doors are closed against them. The *Webb Construction* case, *supra*, where the Eighth Circuit endorsed the views expressed in *Reliable*, also involved, essentially, the question of "encouraging" membership in a closed union, for there the discrimination was directed against an employee who, although he was a member of the union's subordinate apprentice local, was ineligible for admission to full-fledged membership in the union itself because he did not possess the qualifications of a journeyman.

¹⁰ See *General Motors Corp.*, 59 NLRB 1143, 1145, enforced *per curiam*, 150 F. 2d 201 (C.A. 3). The Board there stated, rejecting a contention that certain discrimination in employ-

nation in employment (2) *because* of "membership" in a labor organization are the "evidential facts" (*Republic Aviation Corporation v. National Labor Relations Board* and *National Labor Relations Board v. Le Tourneau Company of Georgia*, 324 U.S. 793, 800) to be established in a case arising under Section 8 (a) (3); the Eighth Circuit goes farther and requires "evidence as to the results which may flow from such facts" (*ibid.*).

Because of the conflict between the decision below and *Teamsters*, and the fundamental importance of the now unsettled questions here discussed, the Solicitor General in behalf of the Board intends to file a petition for a writ of certiorari to review the *Teamsters* decision. In that petition we shall state more fully our reasons for believing that the decision below is right and the *Teamsters* decision wrong. Accordingly we do not oppose the grant of the petition in this case as to the third question presented. However, for the reasons set forth below, we oppose grant of the petition as to the remaining questions.

2. Rejected as "insubstantial" by the court below (R.A. 85), petitioner's contention (Pet., p. 6), "that the failure of the Board to join the employer as a party to the proceeding was fatal to the proceeding," does not pose a question warranting re-

ment based on union activity was not calculated to discourage union membership, "Admittedly the transfer was made *because* the employees * * * had designated the Union as their representative; * * *. Under the circumstances, we find * * * in any event, * * * that the transfer was of such a character as to have a *natural tendency* to discourage union membership." (Emphasis supplied.)

view. Section 8 (b) (2) of the Act provides that it shall be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee *in violation of subsection (a) (3) . . .*" (Emphasis supplied.) In this case the complaining employee, Fowler, filed a charge against the Union alleging that it caused the Company to discriminate against him, but he did not file a charge against the Company alleging that it had engaged in unfair labor practices. Hence, under Section 10 (b) of the Act, the Company was not, and could not properly be made, a party to the proceedings.¹¹ Petitioner argues, nevertheless, that since a finding that the Company engaged "in violation[s] of subsection (a) (3)" could not be made without the Company's participation in the proceeding, the Board was foreclosed from finding that petitioner itself "caused" such an employer violation, in breach of Section 8 (b) (2).

Petitioner points to nothing in the statute and to no judicial authority which even suggests that the Board must charge an employer with violation of Section 8 (a) (3), proceed against him, find him guilty, and issue a remedial order against him, as a condition to finding a union guilty of violating Section 8 (b) (2) of the Act. Indeed, the language of the statute points to a contrary conclusion: the Board, with judicial approval, has held that the

¹¹ Section 10 (b) provides that "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect. . . ." See *Consumers Power Co. v. National Labor Relations Board*, 113 F. 2d 38, 42-43 (C. A. 6).

phrase "in violation of subsection [8] (a) (3)" appearing in Section 8 (b) (2), "was intended by Congress to be [only] descriptive of the kind of discharge it is unlawful for a union to cause or attempt to cause." *National Union of Marine Cooks and Stewards*, 92 NLRB 877, 878, (cited with approval in *National Labor Relations Board v. Newspaper & Mail Deliverers' Union*, 192 F. 2d 654, 656 (C. A. 2)); see also *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1013, 1015 (C. A. 7), certiorari denied, 342 U. S. 815. The soundness of the Board's conclusion is obvious from the fact that a mere "attempt" by a labor organization to cause an employer to violate subsection 8 (a) (3) is a violation of Section 8 (b) (2), even though the attempt failed and the employer did not in fact commit an unfair labor practice. Under the circumstances the court below properly held (R. A. 85), "A finding that the union has violated Section 8 (b) (2) can be made without joining the employer and finding a Section 8 (a) (3) violation."¹²

Petitioner's assertion that the Board abused its discretion, and departed from the policy enunciated in *H. M. Newman*, 85 NLRB 725, by failing to join the Company is also unfounded. As noted above, absent a charge against the Company the Board was

¹² This same principle was applied in a converse situation by the Ninth Circuit, which held that the Board was not precluded from finding an employer alone guilty of violating Section 8 (a) (3) where the union which caused the discrimination was not charged and hence not joined as a respondent. *Katz, d/b/a Lee's Department Store v. National Labor Relations Board*, 196 F. 2d 411 (C. A. 9).

without power to join it as a party. For this reason the *Newman* case is wholly inapposite, for there both the union and the employer responsible for the discrimination against an employee were before the Board as the parties respondent. The only question of policy presented in that case was whether, in such circumstances, both parties respondent should be held jointly and severally liable to make the employee whole.¹³

3. Petitioner contends that its refusal to clear Fowler for jobs with the Company, although this concededly caused Fowler's loss of employment, was only an "expression of views, argument or opinion" protected by Section 8 (c) of the Act, and hence not an unfair labor practice. This contention was properly rejected by the court below on the authority of *International Brotherhood of Electrici-*

¹³ Respondent's companion contention (Pet., p. 19), that the back pay order is invalid without an order of reinstatement, is entirely without merit. It was established by a long line of authorities prior to the amendments to the Act, that a back pay and reinstatement order need not be joined in any particular case and that the Board was vested with the discretion to prescribe either or both remedies. *Phelps Dodge Corp. v. National Labor Relations Board*, 113 F. 2d 202, 205 (C. A. 2), affirmed, 313 U. S. 177, 200; *Indianapolis Power and Light Co. v. National Labor Relations Board*, 122 F. 2d 757, 763, certiorari denied, 315 U. S. 804; *Reliance Manufacturing Company v. National Labor Relations Board*, 125 F. 2d 311, 321 (C. A. 7). The 1947 amendments to the Act, including those to Section 10 (c), in no way limit the power conferred upon the Board in the original Act, to issue remedial orders like those approved in the cases cited above. *Union Starch & Refining Company v. National Labor Relations Board*, 186 F. 2d 1008 (C. A. 7); and note particularly, *Progressive Mine Workers v. National Labor Relations Board*, 187 F. 2d 298 (C. A. 7), amended opinion March 20, 1951, 27 LRRM 2334, where the court amended its original opinion by deleting language which would have sustained the precise contention advanced here by respondent.

cal Workers v. National Labor Relations Board, 181 F. 2d 34, 38, affirmed, 341 U. S. 694, 701-705, and is plainly without merit.

4. Turning as it does on facts peculiar to this case, the Board's determination that the parties had not contracted to establish a hiring hall arrangement does not present a question sufficiently important to warrant review by this Court. Cf. *National Labor Relations Board v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C. A. 3), certiorari denied, 342 U.S. 919. In any event, the concurrent determination of the trial examiner, the Board and the court below that no obligatory hiring hall arrangement had been established is abundantly supported by the record (see, *supra*, pp. 3-6). As the Board and the court below noted (B. A. 25, R. A. 82), the words of the contract were unambiguous and plainly reserved to the Company the "right of free selection" of radio operators subject only to their being in good standing in the Union. Not a word in the contract suggests that the Company must hire radio personnel referred by the Union's dispatching office.¹⁴ Nor was there anything in the practice of the parties in implementing the agreement which would warrant the assertion that the Company had yielded up its contractual right to free selection. The fact that the Company frequently hired its

¹⁴ Compare the following clause from the contract involved in *National Labor Relations Board v. National Maritime Union*, 175 F. 2d 686 (C.A. 2), certiorari denied, 335 U. S. 954. "The Union agrees to furnish satisfactory men and the Company agrees that during the period that this agreement is in effect all replacements shall be hired through the office of the Union, as vacancies occur" (78 NLRB 971, 973).

radio operators through the Union hall, as the court below noted (R. A. 82-83), "did not effect a surrender of the Company's rights under the contract," because "a party to a contract does not lose clearly reserved rights merely by noninsistence upon them in every instance." This is especially true here, where the companies did exercise their right of free selection, and the Union cleared for employment, albeit reluctantly, "many hundreds," of radio operators who were specifically chosen by the shipping companies and not by the Union's dispatching officer (B. A. 167-168).

Petitioner's contention that the Board erred in placing primary reliance on the terms of the contract rather than the practice of the parties likewise merits no consideration by this Court. In the first place, as the court below noted (R. A. 83), nothing in the record or proffered evidence would even tend to establish that the Company had agreed to waive its contractual right of free selection of radio operators. But even if there were some evidence which would tend to establish such a waiver, the Board could properly discount it because, under familiar contract law, where, as here, the terms of a contract are clear, the parties cannot prove an interpretation directly contrary to its plain meaning.¹⁵ This is doubly true where the interpretation would legalize conduct otherwise banned by the statute. Con-

¹⁵ Williston on Contracts, Rev. Ed., Sec. 623, pp. 1793-1794; *South Atlantic Steamship Co. v. National Labor Relations Board*, 116 F. 2d 480, 482 (C. A. 5), certiorari denied, 313 U. S. 582; *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296, 299 (C. A. 7).

tracts providing for union security arrangements, such as the hiring hall practice which petitioner sought to prove as a defense in this case, are valid only by virtue of the union shop proviso to Section 8 (a) (3) ¹⁶ which permits a limited exception to the statutory ban on discrimination in employment based on union membership. A contract cannot come within this statutory exception unless its purpose is expressed in plain and unmistakable terms.¹⁷ Manifestly, here, where the contract by its terms accorded the Company the right of free selection of radio operators, a right directly antithetical to the hiring hall arrangement, and where the countervailing evidence, at best, is equivocal in import, it would be in the teeth of this elementary principle to read the contract as obligating the Company to hire exclusively employees selected by the Union.¹⁸

¹⁶ In this case, because of the provisions of Section 102, the closed shop proviso to Section 8 (3) of the Wagner Act is applicable (see n. 3 *supra*).

¹⁷ *National Labor Relations Board v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2); see also *Phillips Co. v. Walling*, 324 U. S. 490, 493, 498; *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953, 962 (C. A. 2), certiorari denied, 319 U. S. 741.

¹⁸ *National Labor Relations Board v. Scientific Nutrition Corp.*, 180 F. 2d 447, relied upon by petitioner (Pet., pp. 25-26), is distinguishable on the facts. There, because the Company did not expressly reserve, as was done here, the very right which the parties sought to negate by parole evidence, the Court was undoubtedly more inclined to read the practice of the parties into the contract. Moreover, there, unlike here, the record showed that the parties viewed the closed shop practice which was not literally covered by their written contract as nonetheless obligatory (180 F. 2d, at 449). Nothing in the record here or in the proffered evidence shows that the parties deemed the Company *bound* to leave to the Union the choice of personnel.

CONCLUSION

For the reasons stated, we do not oppose the grant of the petition for a writ of certiorari limited to the question of the interpretation of Section 8 (a) (3) of the Act. However, we urge that the petition should be denied with respect to the other questions raised by petitioner.

Respectfully submitted,

✓ ROBERT L. STERN,
Acting Solicitor General.

✓ GEORGE J. BOTT,
General Counsel;

✓ DAVID P. FINDLING,
Associate General Counsel,

✓ MOZART G. RATNER,
Assistant General Counsel;

✓ ELIZABETH W. WESTON,

mi LOUIS SCHWARTZ, *new chairman will preside*
Attorneys, *10/6/50*
15/50
National Labor Relations Board.

AUGUST, 1952.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	3
Statement:	
A. The Board's findings of fact and conclusions of law.....	3
1. As to the hiring contract between the parties.....	3
2. As to the discrimination against Fowler, the charging party.....	7
B. The decision of the court below.....	12
Summary of argument.....	12
Argument:	
I. The conduct of the Union in causing the Company to deny employment to Fowler, a member of the Union in good standing, because of Fowler's failure to adhere to the Union's membership rules concerning the method of obtaining employment, was not sanctioned by the union security agreement and therefore violated Section 8 (b) (2) and (1) (A) of the amended Act.....	18
A. A system of hiring which requires re- course only to a union for assignment to employment and restricts assign- ment to union members in good stand- ing encourages membership in a labor organization.....	21
B. The conduct of the Union in causing the Company to deny Fowler employment was not sanctioned by the union security provision of the agreement....	26

Argument—Continued

The conduct of the Union, etc.—Con.

	Page
C. Neither the merits of the Union's membership rule, nor the purported alternatives that the member may either withdraw from the Union or respect the rule, can justify discrimination in employment when it is unauthorized by a union security agreement.....	34
1. The Union's authority to control employment derived only from the agreement with the Company; the Union's rules, however "equitable," could not expand this authority.....	38
2. The amended Act, while leaving unions free to determine their internal policies, does not authorize the discrimination effected in this case.....	41
II. The Union's discriminatory refusal to grant Fowler clearance for any employment with the Company does not constitute expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.....	44
III. The Board properly proceeded to its finding that the Union had violated Section 8 (b) (2), despite the fact that the employer was not a party, and correctly entered a back-pay order against the Union though no reinstatement order could be entered against the employer....	46
A. The Board is empowered to find that the Union has caused the employer to discriminate despite the fact that the Board cannot, because the employer is not a party to the proceeding, make a similar finding against the employer..	46

Argument— Continued

III. The Board properly proceeded, etc.—Con.	Page
B. The Board did not abuse its discretion in adjudicating that the Union had violated Section 8 (b) (2) though the Company was not a party.....	49
C. The Board is empowered to enter a back-pay order against the Union without a companion reinstatement remedy running against the employer.....	54
Conclusion.....	61

CITATIONS

Cases:

<i>Acme Mattress Co., Inc.</i> , 91 NLRB 1010, enforced, 192 F. 2d 524.....	49, 58
<i>Allis-Chalmers Manufacturing Co. v. National Labor Relations Board</i> , 162 F. 2d 435.....	41
<i>Ansley Radio Corp.</i> , 18 NLRB 1028.....	39
<i>Butler Brothers v. National Labor Relations Board</i> , 134 F. 2d 981, certiorari denied, 320 U. S. 789.....	38
<i>Chicago & E. I. Ry. Co., In re</i> , 94 F. 2d 296....	30
<i>Colgate-Palmolive-Peet Co. v. National Labor Relations Board</i> , 338 U. S. 355.....	19, 39
<i>Cupples Co., Manufacturers v. National Labor Relations Board</i> , 106 F. 2d 100.....	38
<i>Eustis Mining Co. v. Beer, Sondheimer & Co., Inc.</i> , 239 F. 2d 976.....	30, 32
<i>General Drivers v. National Labor Relations Board</i> , 179 F. 2d 492.....	53
<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U. S. 490..	45
<i>Indianapolis Power & Light Co. v. National Labor Relations Board</i> , 122 F. 2d 757, certiorari denied, 315 U. S. 804.....	56
<i>International Association of Machinists v. National Labor Relations Board</i> , 311 U. S. 72....	34
<i>International Brotherhood of Electrical Workers v. National Labor Relations Board</i> , 181 F. 2d 34, affirmed, 341 U. S. 694.....	16, 44-45
<i>Iron Fireman Manufacturing Co.</i> , 69 NLRB. 19..	33

IV

Cases—Continued

	Page
<i>Jacobsen v. National Labor Relations Board</i> , 120 F. 2d 96.....	53
<i>Kansas City Power & Light Co. v. National Labor Relations Board</i> , 111 F. 2d 340.....	38
<i>Katz, d/b/a Lee's Department Store v. National Labor Relations Board</i> , 196 F. 2d 411.....	48
<i>Link-Belt Co. v. National Labor Relations Board</i> , 110 F. 2d 506, affirmed, 311 U. S. 584.....	56
<i>McCullough v. Kammerer Corp.</i> , 323 U. S. 327....	55
<i>McQuay-Norris Mfg. Co. v. National Labor Relations Board</i> , 116 F. 2d 748.....	40
<i>National Labor Relations Board v. American Car & Foundry Co.</i> , 161 F. 2d 501.....	22
<i>National Labor Relations Board v. American National Insurance Co.</i> , 343 U. S. 395.....	34
<i>National Labor Relations Board v. J. I. Case Co.</i> , 198 F. 2d 919.....	57, 58
<i>National Labor Relations Board v. Cheney California Lumber Co.</i> , 327 U. S. 385.....	54-55
<i>National Labor Relations Board v. Don Juan, Inc.</i> , 178 F. 2d 625.....	33
<i>National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc.</i> , 315 U. S. 685.....	40
<i>National Labor Relations Board v. Federal Engineering Co.</i> , 153 F. 2d 233, enforcing 60 NLRB 592.....	39
<i>National Labor Relations Board v. Gluek Brewing Co.</i> , 144 F. 2d 847.....	40
<i>National Labor Relations Board v. Hopwood Retinning Co.</i> , 98 F. 2d 98.....	50
<i>National Labor Relations Board v. Hudson Motor Car Co.</i> , 128 F. 2d 528.....	41
<i>National Labor Relations Board v. Illinois Tool Works</i> , 153 F. 2d 811.....	41
<i>National Labor Relations Board v. Indiana & Michigan Electric Co.</i> , 318 U. S. 9.....	50
<i>National Labor Relations Board v. International Brotherhood of Teamsters</i> , No. 301, October Term, 1952.....	22

Cases—Continued

	Page
<i>National Labor Relations Board v. Jarka Corp.</i> , 198 F. 2d 618.....	45
<i>National Labor Relations Board v. National Garment Co.</i> , 166 F. 2d 233, certiorari denied, 334 U. S. 845.....	56
<i>National Labor Relations Board v. Newspaper & Mail Deliverers' Union</i> , 192 F. 2d 654, enforcing 93 NLRB 419.....	47, 48, 58
<i>National Labor Relations Board v. Perfect Circle Co.</i> , 162 F. 2d 566.....	41
<i>National Labor Relations Board v. Remington Rand, Inc.</i> , 94 F. 2d 862, certiorari denied, 304 U. S. 576.....	38
<i>National Labor Relations Board v. Revlon Prod- ucts Corp.</i> , 144 F. 2d 88.....	56
<i>National Labor Relations Board v. Scientific Nutrition Corp.</i> , 180 F. 2d 447.....	33
<i>National Labor Relations Board v. Star Publishing Co.</i> , 97 F. 2d 465.....	40-41
<i>National Labor Relations Board v. Stilley Plywood Co., Inc.</i> , 199 F. 2d 319.....	37
<i>National Licorice Co. v. National Labor Relations Board</i> , 309 U. S. 350.....	34
<i>National Maritime Union</i> , 78 NLRB 971, en- forced, 175 F. 2d 686, certiorari denied, 338 U. S. 954.....	24
<i>H. M. Newman</i> , 85 NLRB 725, enforced, 187 F. 2d 488.....	58
<i>New York Handkerchief Mfg. Co. v. National Labor Relations Board</i> , 114 F. 2d 144, certiorari denied, 311 U. S. 704.....	56
<i>Pen & Pencil Workers Union</i> , 91 NLRB 883.....	55
<i>Phelps Dodge Corp. v. National Labor Relations Board</i> , 113 F. 2d 202, affirmed, 313 U. S. 177.....	54, 56, 57
<i>Quinley, George C.</i> , 92 NLRB 877.....	47, 48, 53, 55
<i>Red Star Express v. National Labor Relations Board</i> , 196 F. 2d 78.....	22
<i>Reliance Manufacturing Co. v. National Labor • Relations Board</i> , 125 F. 2d 311.....	56

Cases—Continued

	Page
<i>Ritzwoller Co. v. National Labor Relations Board</i> , 114 F. 2d 432.....	56
<i>South Atlantic Steamship Co. v. National Labor Relations Board</i> , 116 F. 2d 480, certiorari denied, 313 U. S. 582.....	30
<i>United States v. Tucker Truck Lines</i> , 344 U. S. 33.....	55
<i>Union Starch & Refining Co. v. National Labor Relations Board</i> , 186 F. 2d 1008, certiorari denied, 342 U. S. 815.....	43, 49, 57, 58, 60
<i>Universal Camera Corp. v. National Labor Rela- tions Board</i> , 179 F. 2d 749, reversed on other grounds, 340 U. S. 474.....	34, 38
<i>Wallace Corporation v. National Labor Relations Board</i> , 323 U. S. 248.....	21

Statutes:

<i>National Labor Relations Act, 1935 (49 Stat. 449, 29 U. S. C., 151, et seq.):</i>	
Section 7.....	19, 35
Section 8 (3).....	18, 24, 40
Section 10 (c).....	17, 55
<i>National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141, et seq.):</i>	
Section 3 (d).....	52
Section 7.....	19, 35
Section 8 (a) (3).....	2, 13, 16, 18, 20, 40, 46, 47, 58
Section 8 (b) (1) (A).....	13, 19, 36
Section 8 (b) (2).....	2, 13, 16, 19, 34, 45, 46, 47, 58
Section 8 (c).....	2, 15, 16, 44, 45
Section 10 (a).....	46
Section 10 (b).....	47
Section 10 (c).....	56
Section 10 (e).....	17, 54
Section 102.....	13, 19, 20, 42

Miscellaneous:

79 Cong. Rec. 7673-74.....	22
93 Cong. Rec. 3836.....	24
93 Cong. Rec. 4021-23.....	36
93 Cong. Rec. 4435-46.....	36

VII

Miscellaneous—Continued

	Page
Hearings before Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, p. 709, in 1 Leg. Hist. 1373, 2 Leg. Hist. 2095.	51
Hearings before Senate Committee on Education and Labor, 73d Cong., 2d Sess., on S. 2926, part I, p. 11, in 1 Leg. Hist. 26, 41, Remarks of Senator Wagner	51
Hearings before Senate Committee on Education and Labor, 73d Cong., 2d Sess., on S. 2926, part I, p. 36-37, in 1 Leg. Hist. 66-67, Remarks of Mr. Handler	51
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 13, 54	59, 60
H. R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. 68, 195	59
H. R. 6288, 74th Cong., 1st Sess., sec. 10 (c), in 2 Leg. Hist. 2459, 2464-2465	50
H. R. 8423, 73d Cong., 2d Sess., sec. 205 (b), in 1 Leg. Hist. 1128, 1133	50
Restatement, Torts, section 882 (1939)	53
S. 1958, 74th Cong., 1st Sess., sec. 10 (c), reprinted in 1 Leg. Hist. 1295, 1301	50
S. 2926, 73d Cong., 2d Sess., sec. 205 (b), reprinted in vol. 1, Legislative History of the National Labor Relations Act, 1935 (U. S. Gov't. Print. Off. 1949), pp. 1, 6	50
Senate Document No. 8, 77th Cong., 1st Sess., Report of Attorney General's Committee on Administrative Procedure, p. 288	51
S. Rep. No. 105, 80th Cong., 1st Sess., 6, 38	25, 60
S. Rep. No. 1184, 73d Cong., 2d Sess., 6	22, 51
S. Rep. No. 1184, 73d Cong., 2d Sess., in 1 Leg. Hist. 1398, 1403	51
3 Williston, <i>Contracts</i> , §623, pp. 1793-94 (rev. ed. 1936)	30

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE RADIO OFFICERS' UNION OF THE COMMERCIAL
TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. II. 78)¹ is reported at 196 F. 2d 960. The findings of fact, conclusions of law, and order of the Board (R. I. 22-75) are reported at 93 NLRB 1523.

JURISDICTION

The decree of the Court of Appeals (R. II. 90-93) was entered on May 22, 1952. The petition for a writ of certiorari, filed on July 28, 1952, was granted on October 20, 1952 (R. II. 94). The jurisdiction of this Court is invoked under Sec-

¹ The transcript of Record is printed in two volumes, herein designated "R. I." and "R. II."

tion 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether, when an employer discriminates against a union member by denying him employment because of the employee's failure or refusal to perform an obligation of union membership, a violation of Section 8 (a) (3) is established without independent proof that the discrimination "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the union.

2. Whether the terms of the union-security agreement, which petitioner invoked to justify the discriminatory denial of employment to an employee, required the employer to hire only employees initially selected by the Union.

3. Whether a union's discriminatory refusal to grant an employee clearance for employment constitutes expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.

4. Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3)." The final question presented is whether, where a union is charged with violating Section 8 (b) (2), the Board may proceed against the union alone without joining the employer,

against whom no charge was filed, and may enter a back-pay order against the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and after amendment (61 Stat. 136, 29 U. S. C. Supp. V, 141, *et seq.*), are set forth in the petitioner's brief at pp. 3-8.

STATEMENT

A. The Board's findings of fact and conclusions of law

This proceeding is founded upon a charge filed by Willard Christian Fowler against petitioner, the Radio Officers' Union (AFL) (herein called the Union), alleging that it caused an employer, the Bull Steamship Company (herein called the Company), discriminatorily to refuse him employment.² Following the usual proceedings under Section 10 (c) of the Act, the Board issued its findings of fact, conclusions of law, and order on April 18, 1951 (R. I. 22-75). The pertinent findings of fact and conclusions of law may be summarized as follows:

1. As to the hiring contract between the parties

The transactions giving rise to this case took place in the early months of 1948. At that time, the Union held a collective bargaining contract with a number of steamship concerns, one of which was the Bull Steamship Company (R. I.

² No charge was filed against the Company (R. I. 78).

44-45; 215-216). The contract, which covered the employment of radio officers on ships of the contracting companies, by its terms required the employers "to select * * * members of the Union in good standing, when available," for employment as radio officers, but the contract expressly reserved to the Company "The right of free selection of all its Radio Officers," and it did not require the Company to leave the selection of its radio officers to the Union (R. I. 44-45; 215-216).³ Its full relevant terms are as follows (*ibid.*):

ARTICLE I—EMPLOYMENT

Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies.

* * * * *

Section 3. When a member of the Union in good standing qualified to fill the vacancy is not available, the Company will notify the Union twenty-four (24) hours in advance before a nonmember of the Union is hired, and give the Union an opportunity to furnish with-

³ The validity of the union-security provisions of the contract, which was negotiated prior to the effective date of the 1947 amendments to the Act, was preserved by Section 102 of the 1947 Act (R. I. 61).

out causing a delay in the scheduled departure of the vessel a competent and reliable Radio Officer with the license necessary for the position to be filled.

* * * * *

Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing.

Though free under the contract to hire any union operator they chose, the companies usually left their choice of radio officers in the hands of the Union. On occasion, however, the companies exercised their contractual right of "free selection" and made their own choice of radio personnel (R. I. 46; 167-168, 81, 204, 82, 90, 138-139). When vacancies occurred, the employers would either call upon the Union to furnish an unemployed member from its shipping list or would name the union member they wished to hire. The Union, depending upon the type of request, would either dispatch an unemployed member of its own selection for the post or would refer the member specified by the employer, furnishing him with a

written "clearance" (R. I. 45-46; 150, 151-153, 163-165, 167-168, 174-176, 177-178, 193-194, R. II. 35, 64, 77). It was the Union's policy and unwritten rule that members desiring employment should apply for work at the union hall and there await their turn to be dispatched to a job. (R. I. 45-46, 59; 150, 151-153, 127, 163-165, 167, 174-175, 178, 193-194). The Union frowned upon the practice of the companies' exercising their contractual right to name their choice of radio officers. According to the Union's general secretary-treasurer, Fred M. Howe, "some of the members don't think too much of that system" (R. I. 57-58; 167-168). Over the years, the Union came to consider it an offense for a member to solicit or accept an offer of employment directly from a company; this offense was deemed particularly serious when acceptance of such an offer would result in the "bumping" of a fellow member (R. I. 48-49, 59-60; 167-168, 116-117, 89, 154-155, 85, 205, 158-159, 210, 160-161).

In the proceedings below, the Union contended that the aforesaid agreement, as implemented by the practice of the parties, obligated the employers and their prospective employees to conform to hiring hall procedure and that the Union, accordingly, could rightfully refuse to "clear" an employee for a position, even though he was a union member "in good standing," if he had dealt directly with the employer about the prospective job, without prior recourse to the Union's

hiring hall. The Board rejected this contention and found that the contract clearly reserved to an employer the right to hire radio officers of its own choosing, provided only that any prospective employee be a "member" of the Union "in good standing" (R. I. 23-25, 58, 61-63).⁴

2. As to the discrimination against Fowler, the charging party

Fowler, an old employee of the Company (R. I. 46; 80), was a long-time member of the Union and at all times herein material was "in good standing" (R. I. 46; 172, 86-87, 93-95, 206-209). On February 24, 1948, at his home in Miami, Florida, he received a telegram from Robert H. Frey, the Company's radio supervisor, summoning him to New York City for immediate assignment to a job on the Company's ship *S. S. Frances* (R. I. 47; 81, 132, 133, 204). Fowler at once notified the Company that he would accept the job (R. I. 47; 81).

That same day in New York, supervisor Frey notified the incumbent radio officer on the *Frances*, a union member named Kozel, that he was to be replaced by "a man with senior service in the company" (R. I. 46; 143). On the 25th, Fowler came to New York to take up his new assignment. He went to the Union headquarters but was unable to see Union Secretary Howe, who was busy at the time (R. I. 47; 82-83, 115). From there, Fowler went to the *S. S. Frances* where he

⁴ Member Murdock dissented on this point (R. I. 31-34).

met Kozel, the radio officer on the preceding voyage (R. I. 46-47; 83, 87, 121, 133-134). Kozel asked Fowler if he had been cleared. Fowler replied in the negative but explained that he had not known there was a radio officer aboard, and suggested that Kozel straighten out the matter with the Union (R. I. 47; 83-84). Kozel reported Fowler's appearance on the ship to the Union that day (R. II. 53). On February 27, Howe, acting without authority and in disregard of the disciplinary procedures prescribed in the Union's by-laws (R. I. 26, 62; 157, 160-162, 210), wired Fowler that he had been suspended from membership in the Union for "bumping" another member and taking the job without clearance (R. I. 47-48; 85, 205).⁵ On the same day, Howe advised the Company by wire that Fowler was not in good standing and called the Company's attention to the "clearance" provisions in the agreement (R. I. 47-48; 212, 181-182).

On February 28, Frey learned that Kozel had left the ship with his baggage and had removed his license from the wall (R. I. 135-136). He thereupon called Howe, reported that Kozel had gone, and requested clearance for Fowler on the *Frances* (R. I. 51; 136-137). Howe refused the request (R. I. 51; 137).

⁵ The trial examiner, the Board, and the court below agreed that the suspension was null and void, because effected without authority, and found that Fowler remained in good standing as a Union member throughout this period (R. I. 62, 26, R. II. 83).

Fowler too, on February 28 and again on March 1, spoke to Howe concerning the suspension telegram and expressly requested clearance for his employment on the S. S. *Frances* (R. I. 52; 88-90). Howe refused the request, asserting that Fowler had violated the Union's rules by failing to obtain "clearance" (*i. e.*, a referral from the dispatcher at the Union's hiring hall) before arranging for the position with Frey, and by "trying to steal jobs from other members" (R. I. 52-53; 89-92, 127-128). Howe declared that the Union would never again clear Fowler for a position with the Company, but suggested that Fowler might take other jobs which the Union had at its disposal (R. I. 52-53; 90, 92). Fowler elected, instead, to return to his home in Florida for the time being (R. I. 92). Unable to obtain a "clearance" for Fowler, the Company, on March 2, gave the job on the *Frances* to another man who was dispatched by the Union (R. I. 52-53; 137).

On April 22, Fowler returned to New York City and again advised the Company that he was available for work before he reported to the Union (R. I. 54; 95-96, 138). On April 25, Fowler went to the Union hall and told Howe, in effect, that he was looking for a job. Howe told him, "We have plenty of jobs available for you but it still stands as far as the Bull line is concerned, you will be given no clearance for any Bull Line ship" (R. I. 54-55; 96-97, 123-

124). He added that supervisor Frey had been "making a company stiff" out of Fowler and that he, Howe, intended "to break it up here and now" (R. I. 54-55; 97), overruling Fowler's protest that nothing in the Union's constitution and by-laws precluded him from working for the Company or any other employer he might prefer (R. I. 54; 124). Two days later, a job opened on the Company's ship *S. S. Evelyn*. Frey asked Howe to clear Fowler for the job, but Howe, adhering to his previously announced position, refused to issue the requested clearance. Frey thereupon hired another man dispatched by the Union (R. I. 56-57; 139-140, 141, 148, 202).

On April 26, Fowler had a final interview with Howe in which the Union official censured him for renewing his contacts with Frey and again accused him of trying to "steal jobs" from fellow members of the Union. When Fowler retorted that Howe appeared to be trying to "railroad" him out of the Union, Howe said, "as far as I am concerned you are through," and suggested that Fowler seek membership in the rival American Communications Association if he desired a job (R. I. 56-57; 102-103, 110, 129, 131).

On the foregoing facts, the Board found (R. I. 23-28, 65-68) that the Union, by refusing to "clear" Fowler in both February and April, 1948, caused the Company to discriminate against him by denying him employment. The Board found that this discrimination, based on Fowler's

alleged disloyalty and infraction of the Union's rules, tended to "encourage * * * membership in [a] labor organization" (Section 8 (a) (3) of the Act), even though Fowler himself was already a member of the Union, in the sense that it was "aimed at compelling obedience to union rules" (R. I. 28). The discrimination, demonstrating the Union's strength, was found to encourage "nonmembers to join it" and "other members to retain their membership" (R. I. 67-68). Therefore, the Board concluded, the discrimination against Fowler was proscribed by Section 8 (a) (3) of the Act, and the Union, by causing the Company so to discriminate, violated Section 8 (b) (2). The Board concluded further (R. I. 59-65, 28) that Fowler had the right under Section 7 of the Act to refrain from observance of the Union's rules because such observance was a form of concerted activity, and hence, as the Union restrained and coerced Fowler (by causing him to lose employment) in his exercise of this statutory right, it violated Section 8 (b) (1) (A) of the Act as well as Section 8 (b) (2). The Board rejected (R. I. 23) the Union's contention that the collective bargaining contract immunized its conduct, finding that the contract only made union membership "in good standing"—a condition which was met in Fowler's case—a prerequisite to the employment of radio officers, and did not, in addition, require

conformity with the Union's hiring-hall rules and procedures.

B. The decision of the court below

The court below affirmed the Board's findings and conclusions and enforced the Board's order in full. In its opinion the court expressly agreed with the Board's conclusion that the collective bargaining contract afforded the Union no defense (R. II. 80-83). The court also agreed that the Union-caused discrimination against Fowler, even though Fowler was a member of the Union at the time, had the effect of encouraging "membership" in the Union. In this connection, the court observed that the discrimination "displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members" (R. II. 85).⁶

SUMMARY OF ARGUMENT

I

A. The system of hiring which the Union sought to effectuate, and which it enforced against employee Fowler, required that union members apply only to the Union for assignment to employment, and restricted assignment to members

⁶ Although Judge Clark dissented (R. II. 86) with respect to the construction of the contract, being of the view that the contract did provide for a hiring hall, he did not disagree with the conclusion of the Board and the court below on the basic question presented here, whether, absent such a contract, the Union's conduct violated Section 8 (b) (2).

in good standing. The inescapable effect of this system of hiring was to encourage union membership. Non-members seeking employment had no alternative but to join the Union as a prerequisite to obtaining a job; existing members were similarly constrained to retain their membership in order to preserve their opportunity for employment; and, in order to remain eligible for assignment to jobs, members were required to maintain their membership in good standing by complying with the Union's membership rules.

Therefore, the Union's conduct, by depriving employee Fowler of the opportunity to work, was "discrimination in regard to hire * * * to encourage * * * membership in any labor organization" within the meaning of Section 8 (a) (3) of the Act. The Union's conduct was also in violation of Section 8 (b) (1) (A) of the Act, for in causing employment to be withheld from Fowler because he failed to adhere to the Union's membership rule concerning the method of obtaining employment, the Union restrained and coerced him in the exercise of his right to refrain from assisting the Union and engaging in its concerted activity. This conduct on the part of the Union, violative of both Section 8 (b) (2) and (1) (A), would be privileged only if it was authorized by the union security provision of its agreement with the Company, which continued to be valid after the Act's amendment by virtue of a savings clause (Section 102).

B. The union security provision of the agreement did not authorize the Union's conduct. The agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available," but the agreement reserved to the Company the "right of free selection" among radio officers who are in good standing, and any radio officer in this class selected by the Company was without more to be given "'clearance' for the position" by the Union. Although more often than not the companies might apply to the Union for the assignment of men, instead of hiring Union members in the open market, this hiring practice was not sufficient to supersede the agreement itself. In this case, exercising its "right of free selection," the Company in February and April, 1948, offered employment to Fowler, who was on both occasions a member of the Union in good standing. In withholding clearance for Fowler, despite its contractual obligation to grant it, the Union was acting in a manner unauthorized by the agreement. Its conduct was, therefore, not privileged.

C. The Union asserts that, apart from the union security agreement, the discrimination it practiced was privileged because its purpose was to enforce an equitable membership rule. But a union's authority to discriminate derives from its union security agreement and not from the equity of its membership rules. It is only through the valid enforcement of such an agree-

ment that a union may achieve the objectives of its membership rules even under the Wagner Act.

The Union further asserts that under the amended Act, so long as an employee remains a member of a union, he submits to having his employment controlled by the union in accordance with its membership rules, and the alternative the amended Act confers is that the employee may withdraw from the union. However, for the period that the union security agreement remained in effect, obligating the Company to hire only union members, an employee could not resign from the union and still work for the Company. Even if he could, this is not the alternative that the Act vouchsafes. For while the amended Act permits a union to adopt and pursue any membership policy it desires, the essence of the statutory scheme is that the union is forbidden to exercise any control over employment for the purpose of enforcing any aspects of its membership policy other than to compel dues payment through a valid union security agreement. Dues payment aside, union membership and the right to a job are divorced.

II

The Union asserts that its refusal to clear Fowler for employment constituted merely a statement of views concerning a breach of its rules and was therefore protected by Section 8 (c) as

an expression of "views, argument, or opinion." But Section 8 (c) safeguards only "noncoercive speech * * * in furtherance of a lawful object;" it does not protect the "bare instigation" of a wrong. *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U. S. 694, 704.

III

A. The Board may find that a union caused an employer to discriminate in violation of Section 8 (b) (2) of the Act, even though, because the employer is not a party to the proceeding, the Board cannot find that the employer discriminated in violation of Section 8 (a) (3). A finding against the employer is not a prerequisite to a finding against the Union.

B. The Board did not abuse its discretion in adjudicating that the Union violated Section 8 (b) (2) of the Act though the Company was not a party to the proceeding. First, no charge had been filed against the Company, and by the time the complaint came before the Board for adjudication, the six-month period of limitations for filing a charge against the Company had elapsed. To dismiss the complaint against the Union, therefore, would not have resulted in a proceeding against both the Union and the Company, but would have resulted in a dismissal as to both. No statutory purpose would be effectuated by permitting the discrimination thus to go entirely un-

remedied. Second, the Union presumes that when the General Counsel of the Board received the charge against the Union, he had no good reason for not suggesting or insisting that a similar timely charge be filed against the Company. But there are a multitude of factors, apart from the bare legal merits of a charge, which go to determining whether a prosecution should be initiated. The Union does not begin to suggest an abuse by the General Counsel in exercising his judgment, even assuming that such a judgment is open to review. Third, it is hornbook law that where several tortfeasors are equally liable for the full loss, one or more may be selected for suit. There is no reason for assuming that the Board has less latitude in its choice of procedures.

C. Section 10 (c) of the Act, in authorizing the Board to order appropriate "affirmative action," empowers the Board to enter a back-pay order without a companion reinstatement direction. This was settled before the 1947 amendments to the Act. The amended Act did not withdraw this previously conferred authority. It merely added illustrative language to indicate an extension of that power to include the entry of appropriate back-pay orders against unions as well as employers. There is, accordingly, no basis for the contention that the Board could not enter a back-pay order against the Union in the absence of an order against the Company, which was not a party to the proceeding and could not be directly

affected by the Board's decision, requiring reinstatement of the employee against whom the Union had caused unlawful discrimination. In any event, this question was not raised before the Board or in the court below, and is therefore not properly before this Court.

ARGUMENT

- I. The conduct of the Union in causing the Company to deny employment to Fowler, a member of the Union in good standing, because of Fowler's failure to adhere to the Union's membership rules concerning the method of obtaining employment, was not sanctioned by the union security agreement and therefore violated Section 8 (b) (2) and (1) (A) of the amended Act**

Section 8 (a) (3) of the amended Act, like Section 8 (3) of the original Act, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The proviso to Section 8 (a) (3) of the amended Act limits the permissible grounds of "discrimination against an employee for nonmembership in a labor organization" pursuant to a valid union security agreement to "the failure of the employee to tender the periodic dues and the initiation fees"; on the other hand, the proviso to Section 8 (3) of the original Act provided without limitation that:

* * * nothing in this Act * * *
shall preclude an employer from making an agreement with a labor organization (not

established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees * * *.

And unlike the original Act, which provided no means of proceeding against a labor organization for restraint, coercion, and discrimination against employees (*Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 363-364), Section 8 (b) (2) of the amended Act makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)," while Section 8 (b) (1) (A) further forbids a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 confers on the employee the right to "refrain" from union activity except as limited by a valid union security agreement.

This case arose under and is governed by the provisions of the amended Act except with respect to the proviso controlling the making and enforcement of union security agreements. Because the agreement in this case was executed between the enactment and the effective date of the amendments and ran for one year, Section 102 of the amended Act makes the proviso to

Section 8 (3) of the original Act applicable.⁷ The original proviso, therefore, governs the enforceability of the union security provision of the agreement.

The union security provision of the agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available" (*supra*, p. 4). Because of employee Fowler's failure to adhere to the Union's unwritten membership rules concerning the method of obtaining employment, the Union caused the Company to deny employment to Fowler in February and April 1948, despite Fowler's retention of membership in good standing at all material times (*supra*, pp. 7-10). The Union seeks to justify the discrimination in hire which it caused by contending (1) that the discrimination did not "encourage or discourage membership in any labor organization" within the meaning of Section 8 (a) (3) of the amended Act, (2) that the discrimination caused was in accord-

⁷ In this respect Section 102 provides: "* * * the provisions of section 8 (a) (3) and section 8 (b) (2) * * * as amended * * * shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title * * *."

ance with its agreement and sanctioned by the original proviso, and (3) that even if the discrimination was not privileged under the terms of the agreement and proviso, the enforcement of "equitable" membership rules by denial of employment is not an unfair labor practice. We believe that these contentions are without merit.

A. A system of hiring which requires recourse only to a union for assignment to employment and restricts assignment to union members in good standing encourages membership in a labor organization.

The Union asserts that membership in it was not encouraged by its refusal to clear Fowler for employment when he obtained positions by direct application to the Company and by the Union's insistence that Fowler apply only to it for assignment to employment (Br., pp. 29-33). The Union overlooks that this system of hiring—recourse only to a union for assignment to employment and restriction of assignment to union members in good standing—is the ultimate in a closed shop arrangement. Such an arrangement cannot survive the prohibition against encouragement of membership in a labor organization by discrimination; without more, this prohibition does "of course outlaw any closed shop, for the very essence of the closed shop is that the employer discriminates in employment to require membership in a particular union." Mr. Justice Jackson, dissenting in *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 266. As explained in the Senate Report accompanying an early ver-

22

sion of the bill which became the Wagner Act (S. Rep. No. 1184, 73d Cong., 2d Sess., 6; see also 79 Cong. Rec. 7673-74):

If this proviso [authorizing closed shop agreements] were not in the bill, a willing employer and willing employees could not of their own accord agree that thereafter a person seeking employment should be required, as a condition of employment, to join the employees' organization.

The reason is that an employer is elsewhere in the bill * * * forbidden to indulge in "discrimination in regard to hire * * * to encourage * * * membership in any labor organization."

But for the proviso, unions "could not have bargained for and obtained an agreement for a closed or union shop." *National Labor Relations Board v. American Car & Foundry Co.*, 161 F. 2d 501, 503 (C. A. 7).

The inescapable effect of the system of hiring the Union sought to impose is to encourage union membership.⁸ *Red Star Express v. National Labor Relations Board*, 196 F. 2d 78, 81 (C. A. 2). Non-members seeking employment have no alternative but to join the Union as a

⁸ In its brief (pp. 30-31), the Union objects to inferring the encouraging tendency of the discrimination from the character of the hiring practice without other evidence to prove the tendency. There is no merit to this contention for the reasons we have stated at pages 37 to 43 of our brief in *National Labor Relations Board v. International Brotherhood of Teamsters*, No. 301, this Term (hereafter called *Teamsters*).

prerequisite to obtaining a job; existing members are similarly constrained to retain their membership in order to preserve their opportunity for employment; and, in order to remain eligible for assignment to jobs, members are required to maintain their membership in good standing⁹ by complying with the Union's membership rules.

Even if the discrimination against Fowler were to be considered in isolation from the overall system of hiring which the Union sought to effectuate, it would be enough to sustain the finding by the Board and the court below that the Act had been violated. Fowler was penalized by denial of employment with the Company for his breach of the membership rules governing the method of hiring. The necessary tendency of this conduct was to encourage his maintenance of membership in good standing by inducing his adherence to the membership rules which state the requirements for good standing.

The Union's conduct not only encouraged Fowler to maintain his membership in good standing, but, as the court below observed (R. II. 84-85), the "result was to encourage membership in the

⁹ In its brief (p. 32), the Union contends that membership does not embrace good standing status. Our answer to this contention is stated at pages 28 to 36 of our brief in *Teamsters*. In this case the Union is in a singularly inappropriate position to urge that membership is restricted to enrollment, for its own agreement is phrased in terms of membership in good standing. Unless membership embraces good standing, the proviso (which is worded in terms of membership only, and without which the agreement would necessarily be invalid) does not sanction the agreement.

union" generally, for "Such conduct displayed to all nonmembers the union's power and the strong measures it was prepared to take to protect union members."

In 1947, when Congress amended the Act, it had no doubt that, but for the proviso, the system of hiring enforced by the Union in this case would be prohibited as encouraging membership by discrimination. To eliminate this system of hiring, Congress left intact the introductory language of Section 8 (3) prohibiting discrimination in employment to encourage or discourage membership, but it curtailed the scope of the proviso by outlawing the "closed shop," permitting only a form of "union shop," and limiting the enforcement of permissible union shop agreements to compelling the payment of union dues. The result, as Senator Taft explained, was that (93 Cong. 3836):¹⁰

* * * the bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. That has produced a situation, certainly on the ships going to Alaska, * * * where there is no discipline. A man may be discharged one day and may be hired the next day, either for the same ship or for another ship. Such

¹⁰ See also, *National Maritime Union*, 78 NLRB 971, 973-980, enforced, 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954.

an arrangement gives the union tremendous power over the employees; furthermore it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field. Under such circumstances there is no freedom of exchange in the labor market, but all labor opportunities are frozen.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6):

It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea.

If the Union is right that its system of hiring does not encourage membership, then the practices denounced by Senator Taft and the Senate Report nevertheless survive, for Congress thought it was reaching these practices through the prohibitory Wagner Act language, namely, by for-

bidding "discrimination in regard to * * * employment * * * to encourage or discourage membership in any labor organization * * *." It is clear that the Union's contention must fail and that it can only prevail if it can show that the conduct condemned in this case was permissible under its agreement with the Company to which the proviso in Section 8 (3) of the original Act applies. We turn, therefore, to the agreement.

B. The conduct of the Union in causing the Company to deny Fowler employment was not sanctioned by the union security provision of the agreement.

The Board found (R. I. 23-25, 62-64), and the court below agreed (R. II. 80-83), that the union security provision of the agreement obligated the Company to hire as radio officers only "members of the Union in good standing, when available," but that the agreement reserved to the Company the "right of free selection" among radio officers who are in good standing, and that any radio officer in this class selected by the Company was without more to be given "'clearance' for the position" by the Union. Exercising its "right of free selection," the Company in February and April, 1948, offered employment to Fowler, who was on both occasions a member of the Union in good standing. Although the Union was under a contractual obligation to grant Fowler "clearance" for the proffered position, the Union withheld "clearance" from him, claiming that Fowler

had breached the membership rules which required him to apply directly to the Union, and not to the employer, in seeking employment. As a result of the Union's denial of "clearance," the Company declined to employ Fowler. In thus causing the Company to discriminate against Fowler in regard to his hire for a reason unauthorized by the agreement, the Union violated Section 8 (b) (2) of the amended Act.

The Union contends, however, that the agreement required the Company to apply only to the Union for the assignment of a radio officer when the Company desired to fill a vacancy; and that in dealing directly with each other, the Company and Fowler failed to adhere to the method of hiring prescribed by the agreement, justifying the Union in refusing to clear Fowler for employment (Br., pp. 40-44). Neither the terms of the agreement, nor the practice which the Union asserts controls its meaning, support the interpretation advanced by the Union.

By Section 1 of the agreement, "The Company agrees when vacancies occur * * * to select * * * members of the Union in good standing, when available * * *" (R. I. 215, emphasis supplied). Section 6 of the agreement makes clear that in agreeing "to select" union members, the Company has not limited itself to a selection from among the radio officers initially referred to it by the Union, but that it has reserved the right "to select" among union members

in the open market. Section 6 provides that (R. I. 215):

The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary "clearance" for the position to which the Radio Officer has been assigned. If a member is not in good standing the Union will so notify the Company in writing.

After first reserving to the Company "the right of free selection," the remainder of Section 6 is devoted to spelling out a procedure which assures that the radio officer selected in the open market will be qualified as a Union member in good standing. To this end, "when members of the Union are * * * hired," the Company obligates itself "to assure that such members are in good standing," and the Union in turn obligates itself "to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned." As the Board observed (R. I. 24):

Logic impels the conclusion that these two obligatory provisions are complementary; the Company is charged with responsibility to ascertain the good standing of any radio officers it might hire, and the [Union], best

informed as to their union standing, is obligated to certify their status and thereby to assure the Company that it has carried out its contractual obligation. That this is the correct import of the clearance provision of the contract * * * is definitely established by the last clause in the same section 6: it reads, "If an employee is not a member in good standing, the Union will so notify the Company in writing." If * * * the Company were only permitted to hire employees referred by the union, there could be no occasion for the union to advise the Company that any particular employee, referred from the union hall, was not in good standing. This last sentence of section 6 could only refer, then, to the situation where the Company directly hires an employee whom it believes to be in good standing, but who, in the opinion of the union, is not.

The court below agreed (R. II. 82): "These provisions plainly give the company the right to select the man it desires to hire, and require the union to grant 'clearance' if the man the company wants is a member in good standing."

The Union claims that the word "clearance" used in section 6 of the contract is ambiguous (Br., p. 41). But it fails to advance a single reason to detract from the analysis made by the Board and the court of the function of the word in the context of the section as a whole. And the interpretation of the agreement which the Union would substitute—that the Company is restricted

to hiring radio officers initially referred to it by the Union—cannot be adopted without nullifying the words reserving to the Company “the right of free selection.” Furthermore, when parties desire to establish the arrangement urged by the Union, they have no difficulty devising a form of words expressing that intention without ambiguity (R. I. 25, n. 6, collecting illustrative agreements requiring hiring through a union). In short, except for the meaning given the agreement by the Board and the court, it “admits of no interpretation which does not distort it beyond what the words will bear.” Judge Learned Hand, in *Eustis Mining Co. v. Beer, Sondheimer & Co., Inc.*, 239 Fed. 976, 986 (S. D. N. Y.); see also, 3 Williston, *Contracts*, § 623, pp. 1793–94, (rev. ed. 1936); *South Atlantic Steamship Co. v. National Labor Relations Board*, 116 F. 2d 480, 482 (C. A. 5), certiorari denied, 313 U. S. 582; *In re Chicago & E. I. Ry. Co.*, 94 F. 2d 296, 299 (C. A. 7).

In essence, therefore, the Union is reduced to the claim that the agreement has been superseded by a purported actual hiring practice so compelling in character that the practice, rather than the agreement, is the controlling contract. But the practice, which the Union was given a full opportunity to prove (R. I. 150–153, 163–165,

167-168, 174-179, 193-194, R. II. 34-35),¹¹ establishes only that more often than not the companies, rather than hire in the open market, would apply to the Union for the assignment of radio officers when there was a vacancy to fill. The testimony of the Union's representative itself shows that the practice of hiring through the Union was by no means uniform (R. I. 167-168):

The WITNESS. * * * There have been cases where a company has asked for a certain individual. That is not very frequent, however. In fact, it is very, very infrequent. They do not call up and say, "We want Mr. Joe Beef," or "We want Mr. Fowler." They call up and say, "Send me down a radio officer."

Trial Examiner SCHARNIKOW. What happens in the case where they ask for a specific man?

The WITNESS. We will ask them why they prefer this man or we will endeavor to get hold of the man, if we can, if he is available, we try to get him for the company. But we do like to know the reason why they want a certain individual.

¹¹ In its brief (p. 41), the Union contends that it was unduly restricted in its proof as to the practice. But the court below held that it "can find in the record no exclusion of proffered evidence which would add anything material" to what the Union sought to and did establish (R. I. 83). The Union points to the examiner's rulings sustaining objections to certain questions (R. II. 44-46), but the Union did not at that stage offer to show, and it does not even now state, what evidence it sought to adduce by the rejected line of inquiry.

Trial Examiner SCHARNIKOW. Do you clear a man in that case at the instance of the company in spite of the fact that he is not at the top of the list?

The WITNESS. *We have cleared many hundreds of them.* I can say at this time some of our members don't think too much of that system. [Emphasis supplied.]

A practice to which there are admittedly "many hundreds" of exceptions hardly has the cogency to supersede the actual writing which the employers and the Union have adopted as the solemn expression of their agreement.¹² The court below therefore properly concluded (R. II. 83):

We agree with the Board that such practice did not effect a surrender of the company's

¹² Compare Judge Learned Hand in *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 Fed. 976, 985 (S. D. N. Y.): "The admissibility of the general surroundings in which the contract was written (*Merriam v. U. S.*, 107 U. S. 437, 441 * * *), rests upon * * * the ambiguity of the written words. All the attendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include."

rights under the contract. In most instances the company may have found it more convenient to ask the union to send a man than to find one for itself, but a party to a contract does not lose clearly reserved rights merely by noninsistence upon them in every instance.

An interpretation of a union security agreement which hews closely to the meaning expressed by the language, and which treats with caution any practice urged in substitution for the language, is in keeping with the character of the proviso which permits such agreements. For in "view of the stringent requirements of closed-shop provisions, it is not too much to require that the parties thereto express the essentials of such provisions in unmistakable language." *Iron Fireman Mfg. Co.*, 69 NLRB 19, 20. In addition, the "proviso in Section 8 (3) follows a prohibition of employer discrimination, and one seeking to come within the exception must clearly comply with its terms." *National Labor Relations Board v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2).¹³

We submit, in short, that the Board and the court below were clearly correct in rejecting the

¹³ To support its view (Br., pp. 43-44), the Union cites *National Labor Relations Board v. Scientific Nutrition Corp.*, 180 F. 2d 447 (C. A. 9), but that case is not contrary to the decision below. In that case an equivocal union security provision was construed in the light of an unambiguous practice to establish a closed shop. In this case the Union would substitute an equivocal practice for unambiguous language.

Union's claim that its agreement with the Company authorized the discrimination in this case. It bears mention, moreover, that the concurrent determination of the Board and the court below of the meaning of the language of the agreement, and the influence that a practice is to have on its interpretation, should be conclusive at least in the absence of an exceptional showing of error. See *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 75; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357. 'This sort of question is "in the keeping of the Courts of Appeals."' *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 491; see also *National Labor Relations Board v. American National Ins. Co.*, 343 U. S. 395, 409-410.

C. Neither the merits of the Union's membership rule, nor the purported alternatives that the member may either withdraw from the Union or respect the rule, can justify discrimination in employment when it is unauthorized by a union security agreement.

Since the conduct of the Union in causing the Company to deny Fowler employment encouraged membership in the Union (*supra*, pp. 21-26), and since the discrimination practiced was unauthorized by the union security agreement (*supra*, pp. 26-34), there is no question that the Union violated Section 8 (b) (2) of the Act, for it caused the "employer to discriminate against an employee in violation of subsection [8] (a) (3) * * *"

By the same conduct the Union also violated Section 8 (b) (1) (A). That section safeguards employees against restraint and coercion by a labor organization "in the exercise of the rights guaranteed in section 7." Section 7 confers on employees the right to "assist labor organizations" and to engage in other "concerted activities" for other "mutual aid or protection;" but it also confers on employees the converse right "to refrain from any or all of such activities" except as limited by a valid union security agreement. The Union's conduct in fostering a system of hiring which would require employers to apply only to it for the assignment of union members clearly constituted concerted activity for mutual aid or protection (R. I. 59-60). But, equally clearly, Fowler's refusal to cooperate with the Union in its program constituted an exercise of the right to "refrain" from "assisting" the Union or engaging in its "concerted activity." That abstention is protected from restraint and coercion. As the court below held (R. II. 84), when because of this abstention the Union refused to clear Fowler for employment with the Company, in a manner unauthorized by the union security agreement, the Union was exerting "economic coercion in its most effective form." It was against such deprivation of the opportunity

to work that Section 8 (b) (1) (A) was directed.¹⁴

The Union contends, however, that even apart from the union security agreement, the denial of employment to Fowler was justified because its purpose was to enforce an "equitable" membership rule and not one "of the 'indefensible' variety" (Br., pp. 33-34). It asserts that in requiring members to seek employment only through the Union, and not by direct application to the employer, the Union's purpose is to assure (1) that the member longest unemployed will be the first hired, and (2) that a member on a job who is doing his work satisfactorily will not be displaced ("bumped") by another member. The

¹⁴ Thus, Senator Taft summarized the mandate the section addresses to unions as follows: "You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn * * * You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, *prevent them from exercising their right to work.*" 93 Cong. Rec. 4436, [emphasis supplied]; see also 93 Cong. Rec. 4435-4436, 4021, 4023.

The Union concedes (Br., p. 28) that it may have "interfered" with Fowler's employment but argues that "interference" was specifically omitted as a form of violation from Section 8 (b) (1) (A). "Interference" was deleted from 8 (b) (1) (A) because it was deemed vague and because it might be construed to apply to legitimate union activity. 93 Cong. Rec. 4021-4023. This deletion was not intended to permit union instigation of job discrimination, which was, indeed, one of the major evils at which the section was aimed. See 93 Cong. Rec. 4435-4436, 4021-4023.

Union states further that "In the instant case, the denial of clearance [to Fowler] was motivated by the twofold purpose of (1) enforcing these rules of fair dealing and, (2) in the February incident, of protesting the wrongful discharge of Kozel, the incumbent union member, whose services had been satisfactory to the Company, and who desired to retain his post" (Br., p. 34).¹⁵ But

¹⁵ There is a suggestion in the Union's brief (pp. 11, n. 4, 29, n. 7) that with respect to Kozel, the Union was acting not only to enforce its membership rule, but also to vindicate Kozel's alleged contractual right not to be discharged if his work was satisfactory. The assertion that the Union's conduct was prompted by this added motive has little factual support. The contractual provision referred to seems to safeguard the Company against a Union demand for the discharge of a satisfactory employee; it does not appear to safeguard the satisfactory employee from discharge by the Company (R. II. 72). In addition, the contract seems to require that any disputes of this character shall be handled through the grievance procedure of the contract (R. II. 72-73), which was not done here. Moreover, even during the February denial of employment to Fowler, the Union denied clearance to Fowler after Kozel had left the ship. Despite Kozel's relinquishment of interest in retaining the job, the Union denied the Company's later request to clear Fowler. The Union dispatched a third radio officer, Miller, for employment with the Company, despite Fowler's availability, and at a time when Kozel's interest in the job could no longer be a factor. (R. I. 53, 50-53; 125, 135-137, 144, R. II. 64-65).

There seems to be, therefore, no reasonable likelihood that Kozel's alleged contractual right was the reason for the Union's conduct. But if it were, it is at best only part of the reason, and it is settled law that where lawful and unlawful purposes are intermingled, the conduct is wrongful; hence the court below properly concluded that Kozel's alleged contractual right "is immaterial" (R. II. 85). *E. g., National Labor Relations Board v. Stillely Plywood Co., Inc.*, 199 F.

these contentions are immaterial. For neither the Union's agreement with the Company, to which the original Act applies, nor the provision of the amended Act leaving unions free to regulate their internal affairs as they see fit, can justify the discrimination in this case.

1. *The Union's authority to control employment derived only from the agreement with the Company; the Union's rules, however "equitable", could not expand this authority.*

The Union's argument overlooks that under the Wagner Act, which admittedly governs the agreement between the Union and the Company in this case, Congress provided a specific method by which a union might achieve the objectives of its membership rules. That method was the union security agreement. The essence of the method was that by an agreement a union was vested with the power to cause impairment of a worker's employment if the worker failed to acquire or retain

2d 319, 320 (C. A. 4) ("contributory factors"); *Universal Camera Corp. v. National Labor Relations Board*, 179 F. 2d 749, 754 (C. A. 2), reversed on other grounds, 340 U. S. 474 ("one of the causes"); *Butler Bros. v. National Labor Relations Board*, 134 F. 2d 981, 985 (C. A. 7), certiorari denied, 320 U. S. 789 ("at least a contributing motive"); *Kansas City Power & Light Co. v. National Labor Relations Board*, 111 F. 2d 340, 349 (C. A. 8) ("at least one purpose"); *Cupples Co. Mfrs. v. National Labor Relations Board*, 106 F. 2d 100, 117 (C. A. 8) ("at least a contributing cause"); *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576 ("at least one cause").

In any event, the April denial of employment to Fowler cannot be explained on the basis of vindicating a contractual right rather than enforcing a membership rule.

union membership in good standing in accordance with the standards prescribed by the union. See Board's brief in *Teamsters*, pp. 17-18, 30-33. Thus, in this case, on the basis of Fowler's breach of the unwritten membership rule concerning the method of hire, the Union could have divested Fowler of his status as a member in good standing, and thereupon it could have denied him employment in accordance with the agreement. Failing that, it was unauthorized to impair his employment, whether or not the membership rule was equitable or inequitable.

For example, a membership rule prohibiting dual union activity was certainly equitable from the union's standpoint. *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355. Yet a member's default in the performance of this obligation of membership, if the default was not translated by the union into loss of membership in good standing, did not justify any discrimination in the member's employment, even if a valid union security agreement existed. *Ansley Radio Corp.*, 18 NLRB 1028, 1042-1043; *National Labor Relations Board v. Federal Engineering Co.*, 153 F. 2d 233, 235 (C. A. 6), enforcing 60 NLRB 592, 593. Conversely, if a member was divested of his good standing, a union-security agreement could validly be invoked to impair his employment, and it did not matter how inequitable the underlying membership rule was. (See Board's brief in *Teamsters*, pp. 19-20, collecting

instances of enforcement of union security agreements which were abusive in the view of Congress.) In short, a union's authority to control employment on the basis of its membership rules lay in its union security agreement and not in the equity of its rules.¹⁶ As this Court has explained, the "provision for a closed shop, as permitted by § 8 (3), follows grammatically a prohibition of discrimination in hiring. These words of the exception" were "carefully chosen to express the precise nature and limits of permissible" discrimination. *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 694-695. The permissible discrimination was defined and confined by the union security agreement. In this case the discrimination practiced exceeded the sanction of the agreement. The Union could not substitute its unwritten membership rules for the agreement, however worthy its motive.¹⁷ Any other result would have permitted

¹⁶ It bears emphasis that this case involves Section 8 (3) of the original Act, not Section 8 (a) (3) of the amended Act. Under the latter, which permits discrimination against an employee pursuant to a union security agreement only for failure to pay dues or initiation fees, such agreements no longer afford a lawful means of enforcing union rules regarding matters other than dues or fees.

¹⁷ It has long been settled that where prohibited conduct is engaged in, the offender is justified neither by "good faith" (*McQuay-Norris Mfg. Co. v. National Labor Relations Board*, 116 F. 2d 748, 752 (C. A. 7)), nor the absence of evil "animus or desire" (*National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8)), nor the "serious dilemma" of his position (*National Labor Relations*

the Union to enlarge the agreement it was able to negotiate—a contract reserving to the Company the right of free selection among radio officers in good standing—to an agreement it failed to negotiate—a contract restricting employment to union members initially referred to the Company by the Union.

2. The amended Act, while leaving unions free to determine their internal policies, does not authorize the discrimination effected in this case.

The Union contends in effect that as long as an employee remains a member of a union, he submits to having his employment controlled by the union in accordance with its membership rules, and impairment of his employment to enforce these rules is not the kind of discrimination, restraint and coercion against which either the original or the amended Act aims (Br., pp. 35-39, 31-33). It urges that "Fowler was free to resign from the Union or to have nothing to do with the Union's hiring hall, but he was" not "free to remain a member of the Union and utilize the facilities of the Union's hiring hall upon his own terms * * *" (Br., p. 39).

Board v. Star Publishing Co., 97 F. 2d 465, 471 (C. A. 9)), nor "good business reasons" (*Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 440 (C. A. 7)), for a statutory infraction is not condoned by the worthiness of the "motive". *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C. A. 6); *National Labor Relations Board v. Perfect Circle Co.*, 162 F. 2d 566, 573 (C. A. 7).

And it appears to rely (Br., p. 32) on the proviso to Section 8 (b) (1) (A) of the amended Act which states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

It may be noted at the outset that the Union's argument involves the incorrect assumption that Fowler had the realistic alternative of resigning from the Union. So long as the union security agreement remained in effect (validated for a year by Section 102 of the amended Act, *supra*, pp. 4, n. 3, 19-20, n. 7), it obligated the Company to hire only members of the Union in good standing, and Fowler could not resign from the Union and still work for the Company or any other carrier covered by a similar agreement. But even if Fowler could resign from the Union and continue to work without hindrance from it, the amended Act is not premised on the view that the choice vouchsafed the employee is to resign from the Union, and be free of discrimination and restraint by it, or to stay in the Union, and submit to its discriminatory control over employment. For that view presupposes that as against labor organizations Congress safeguarded only the job rights of non-union employees and that it was indifferent to the job rights of union members. But in curtailing the scope of the union security agreement in the amended Act, Congress was clearly concerned with what it con-

ceived to be the abuses against *union members* which were perpetrated through these agreements. See Board's brief in *Teamsters*, pp. 19-20. And while the amended Act permits a union to adopt and pursue any membership policy it deems wise, to exert any internal union discipline it desires, and to deny or terminate membership on any ground it chooses, the essence of the statutory scheme is that the union is forbidden to exercise control over employment for the purpose of enforcing any aspect of its membership policy other than to compel dues payment through a union security agreement. *Id.*, pp. 22-25. The proviso to Section 8 (b) (1) (A) safeguards the union's right to promulgate its membership policy; but the remainder of the statutory scheme safeguards the employee from compulsory adherence to it through control over his employment. *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815. In short, except for dues payment through a valid union security agreement, union membership and the right to a job are divorced.

Therefore, the true alternatives which the amended Act confers on an employee are to join a union, to be a good, bad, or indifferent union member, or to withdraw from a union; and to be uninfluenced in any of these choices by concern that his employment will be affected by his decision. And in dealing with a dissident union mem-

ber, the true alternatives which a union has are to tolerate, suspend or expel him, or apply internal union sanctions against him, but not to exert any employment pressure on him based on default in the performance of his membership obligations. For with the exception of compelling dues payment through a valid union security agreement, a labor organization is divested of all control over employment for the purpose of either advancing or retarding an employee's exercise of the right to participate in or to forego union activity. See Board's brief in *Teamsters*, pp. 13-26.

II. The Union's discriminatory refusal to grant Fowler clearance for any employment with the Company does not constitute expression of "views, argument, or opinion" protected by Section 8 (c) of the Act

The Union contends (Br. pp. 26-29) that its refusal to grant Fowler clearance for employment with the Company constituted merely an expression of views concerning a breach of its rules, not accompanied by any "threat of reprisal or force or promise of benefit," and was therefore protected by Section 8 (c) of the Act as an expression of "views, argument, or opinion."

Verbal inducement of unlawful conduct is not safeguarded by Section 8 (c) of the Act. "The remedial function of Section 8 (c) is to protect noncoercive speech by employer and labor organization alike in furtherance of a lawful object;" it does not protect "bare instigation" to unlawful conduct. *International Brotherhood of Electrical*

Workers v. National Labor Relations Board, 341 U. S. 694, 704.¹⁸ As explained in *National Labor Relations Board v. Jarka Corp.*, 198 F. 2d 618, 621 (C. A. 3):

* * * we think an understandable and reasonable distinction can and should be drawn between such expressions of views as are protected generally by Section 8 (c) and that exhortation of another to action which is intended to cause or does cause unlawful discrimination in hiring, a wrong prohibited by Section 8 (b) (2).¹⁹

No immunity, statutory or constitutional, extends to "speech or writing used as an integral part of conduct in violation of a valid * * * statute." *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 498.

Accordingly, the statements expressing the Union's refusal to clear Fowler for employment because of his breach of membership rules are not protected by Section 8 (c). They amount to no more than verbal inducement to discrimination, the "bare instigation" of a wrong.

¹⁸ For a full statement of the scope of Section 8 (c), see pages 36-39, 44-55 of the Board's brief in *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U. S. 694, October Term, 1950, No. 108.

¹⁹ In the Second Circuit's decision in *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, 38, affirmed, 341 U. S. 694, 704, in an opinion by Judge Learned Hand, the identical view was expressed concerning the relationship of Section 8 (c) to Section 8 (b) (2).

III. The Board properly proceeded to its finding that the Union had violated Section 8 (b) (2), despite the fact that the employer was not a party, and correctly entered a back-pay order against the Union though no reinstatement order could be entered against the employer

The Union contends (1) that the Board has no power to find that the Union, in violation of Section 8 (b) (2), caused the Company to discriminate against Fowler, unless the Company is a party to the proceeding and is concomitantly found to have violated Section 8 (a) (3); and (2) that, in any event, the Board has no power to assess back pay against the Union, because back pay cannot be awarded without a companion reinstatement order running against the employer. (Br., pp. 19-26.) We shall show that each of these contentions is without merit.

A. The Board is empowered to find that the Union has caused the employer to discriminate despite the fact that the Board cannot, because the employer is not a party to the proceeding, make a similar finding against the employer.

There is no statutory support for the Union's contention that, unless the employer is a party to the proceeding and is found to have discriminated in violation of Section 8 (a) (3), the Board has no power to find that the union has caused discrimination in violation of Section 8 (b) (2). Section 10 (a) of the Act, defining the power of the Board, provides in relevant part that:

The Board is empowered, as hereinafter provided, to prevent *any person* from engaging

in any unfair labor practice (listed in section 8) affecting commerce. [Emphasis supplied.]

The only relevant limitation upon the exercise of this power is that until "it is charged that any person" has engaged in an unfair labor practice, the Board may not proceed against "such person." (Section 10 (b) of the Act.) In this case, the Union was charged with engaging in unfair labor practices (R. I. 8-10), and therefore the only relevant pre-condition to the Board's proceeding against it was satisfied.

The Union purports to find an implied limitation on the Board's power in the language of Section 8 (b) (2) itself. This provision declares that it shall be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee *in violation of subsection [8] (a) (3) * * **" (Emphasis supplied). The argument runs that, since the Company is not a party to the proceeding, it cannot be found to have violated Section 8 (a) (3), and therefore the Union cannot be held to have caused discrimination "in violation of subsection [8] (a) (3)." The fallacy in this argument is the assumption that a finding against the employer is a prerequisite to a finding against the union.

There is no basis for the assumption. *George C. Quinley*, 92 NLRB 877, cited with approval in *National Labor Relations Board v. Newspaper and Mail Deliverers' Union*, 192 F. 2d 654, 656

(C. A. 2). In *Quinley*, the Board explained that the language reading "in violation of subsection (a) (3)," appearing in Section 8 (b) (2), "was intended by Congress to be *descriptive* of the kind of discharge it is unlawful for a union to cause or attempt to cause. We note that an *attempt* by a labor organization to cause a discriminatory discharge is a violation of Section 8 (b) (2), even though it would never be possible to find a violation of Section 8 (a) (3) by the employer where he resisted the attempt and refused to discriminate. Necessarily, therefore, the statutory words 'in violation of subsection (a) (3)' are merely descriptive with reference to an attempt. These same quoted words do not take on a new and different meaning when the attempt succeeds—they again merely describe the kind of discharge it is unlawful for the union to demand" (92 NLRB at 878). Accordingly, "whether or not the employer is a party to a proceeding," in "order to establish a violation of Section 8 (b) (2)," it is only necessary to "prove that the labor organization 'caused' the employer to engage in conduct which—if the employer were before the Board—would be found to violate Section 8 (a) (3)." *Newspaper and Mail Deliveries' Union*, 93 NLRB 419, 420, enforced, 192 F. 2d 654, 656 (C. A. 2). Accord: *Katz, d/b/a Lee's Department Store v. National Labor Relations Board*, 196 F. 2d 411, 416 (C. A. 9), where in the converse situation, it was held that the Board was not pre-

cluded from finding an employer alone guilty of violating Section 8 (a) (3) where the union which caused the discrimination was not charged and hence not joined as a respondent.

B. The Board did not abuse its discretion in adjudicating that the Union had violated Section 8 (b) (2) though the Company was not a party.

The Union contends further that, whatever may be the Board's power to act, it abused its discretion in not dismissing the complaint, urging that to proceed against the Union without also proceeding against the Company fails to advance the policies of the Act. Its major premise is that where both a union and an employer are responsible for discrimination, and both are parties to the proceeding, the Board assesses each of them with joint and several liability for any loss of pay resulting from the discrimination, and it does not apportion their liability on the basis of relative culpability.²⁰ (Br., pp. 21-22.) From the premise that each is independently responsible for the full loss, even when both are parties to the proceeding, the Union deduces the inconsistent conclusion that the prosecution should not be permitted to proceed against one alone. It asserts that "approval of this practice"—proceeding against one alone—"under the circumstances here involved"

²⁰ *E. g., Union Starch and Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1013-1015 (C. A. 7), certiorari denied, 342 U. S. 815; *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1013-1018, enforced, 192 F. 2d 524, 528 (C. A. 7).

entails the "possible evil consequences" of "collusive injury and of arbitrary favoritism" (Br., p. 23). To support this vague suggestion of "evil consequences" which it views as "readily foreseeable," the Union does not specify a single circumstance in this or any other case suggesting any abuse, nor does it detail any abuses reasonably to be anticipated which would warrant the adoption of a fixed rule requiring joinder of employer and union whenever both are responsible for discrimination.

It is patent that the Union has shown no abuse of discretion; indeed, the actual danger of abuse and defeat of the Act's purposes lies in the adoption of the Union's suggestion, as may readily be demonstrated.

1. No charge was filed against the Company in this case (R. I. 78). Without a charge the General Counsel of the Board had no authority to issue a complaint against the Company.²¹ The

²¹ Section 10 (b) of the Act; *National Labor Relations Board v. Hopwood Retinning Co.*, 98 F. 2d 98, 102 (C. A. 2); cf. *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 17. Early versions of the bill which became the Wagner Act permitted the Board to proceed without a charge, but for reasons not now ascertainable, that discretion was withheld from the Board in the Act as finally adopted. S. 2926, 73d Cong., 2d Sess., sec. 205 (b), reprinted in Vol. 1 of the Legislative History of the National Labor Relations Act 1935 (U. S. Gov't Printing Office, 1949), pp. 1, 6; sec. 205 (b) of H. R. 8423, 73d Cong., 2d Sess., reprinted in 1 Leg. Hist. 1128, 1133; sec. 10 (c) of S. 1958, 74th Cong., 1st Sess., reprinted in 1 Leg. Hist. 1295, 1301; sec. 10 (c) of H. R. 6288, 74th Cong., 1st Sess., reprinted in 2 Leg. Hist.

complaint against the Union was issued on March 2, 1950 (R. I. 11, 15), based on unfair labor practices occurring in early 1948. Therefore, by the time the complaint came before the Board for adjudication, the six-month period of limitations prescribed by Section 10 (b) for filing a charge against the Company had long since elapsed. Had the Board dismissed the complaint for "failure to join the employer" (Br., p. 20), as the Union maintains should have been done, it would no longer have been within the power of anyone to file a valid charge against the Company, the period of limitations having run. Hence, the result of dismissing the complaint against the Union would not have been to induce a proceeding against both the Company and the Union; the result would have been to have the discrimination practiced go entirely unremedied.

2. The Union appears to assume that the General Counsel of the Board, when he received the charge against the Union, had no good reason for not suggesting or insisting that a similar timely

2459, 2464-2465. See also the remarks of Senator Wagner, in Hearings before the Senate Committee on Education and Labor, 73d Cong., 2d Sess., on S. 2926, Part I, p. 11, reprinted 1 Leg. Hist. 26, 41; remarks of Mr. Handler at pages 36-37 of the same Hearings, reprinted *id.* at 66-67; S. Rep. No. 1184, 73d Cong., 2d Sess., reprinted *id.* at 1398, 1403; Hearings before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., on S. 1958, p. 709, reprinted in 1 Leg. Hist. 1373, 2 *id.* 2095. See also Sen. Doc. No. 8, 77th Cong., 1st Sess., Report of the Attorney General's Committee on Administrative Procedure, p. 288.

charge be filed against the Company. But there are a multitude of factors, apart from the bare legal merits of a charge, which go to determining whether a prosecution should be initiated. For example, it may have been thought that the Company's offense was unwitting, made under the pressure of a closed shop agreement, not indicative of a disposition to dishonor the statutory rights of employees, and therefore not worthwhile prosecuting; it may also have been thought that without the Company's cooperation, which might not have been forthcoming if it were also proceeded against, the requisite proof to establish the Union's unfair labor practices could not be obtained.

These are factors legitimately to be considered in determining whether to prosecute. In conferring on the General Counsel of the Board "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board," Section 3 (d) of the Act entrusts the evaluation of these factors to the General Counsel as the prosecuting arm of the agency. Neither the Board, as the adjudicatory arm of the agency, nor a reviewing court, has access to the information on which he acts. As the Board has explained, "dismissal of the complaint against the * * * Union, * * * solely because no complaint against the Employer was issued by the

General Counsel, would be * * * an intrusion upon his exclusive province." *George C. Quinley*, 92 NLRB 877, 879. The character of the problem makes it plain that "the course to be pursued rests in the sound discretion of the [General Counsel of the] Board and is the concern of expert administrative policy. That discretion is not a legal discretion at least in so far that upon the abuse of it the several circuit courts of appeals might compel the [General Counsel of the] Board to issue a complaint." *Jacobsen v. National Labor Relations Board*, 120 F. 2d 96, 100 (C. A. 3); see also, *General Drivers v. National Labor Relations Board*, 179 F. 2d 492, 494-495 (C. A. 10), and cases cited at n. 5 thereof.

3. It is hornbook law that one of several tortfeasors may be selected for suit where each is liable for the full loss. *Restatement, Torts*, § 882 (1939).²² The Union concedes, indeed insists, that had the Company been joined, the Union would nevertheless be jointly and severally responsible for the entire loss resulting from the discrimination (Br., pp. 21-22). In the absence of compelling circumstances, not here suggested, there is no reason to suppose that the Board is confined more narrowly in its choice of procedures than is true in a conventional lawsuit. On

²² "Where each of two or more persons is liable for the full amount of damages which are allowed for a single harm resulting from their tortious conduct, the injured person can properly maintain a single action against one, some, or all of them."

the contrary, in vindicating the public right, it enjoys a greater latitude. Compare *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188.

C. The Board is empowered to enter a back-pay order against the Union without a companion reinstatement remedy running against the employer.

The Union contends that, in requiring it to reimburse Fowler for any back pay he lost as a result of the discrimination against him, the Board's order "clearly contravenes Section 10 (e) in that it contains a back pay provision although no reinstatement direction is contained therein" (Br., p. 25). We shall show, first, that the Union is precluded from raising this question because it failed to present it to the Board or the court below, and, second, that the contention is in any event without merit.

1. The issue whether a back-pay order can be entered against the union without a companion reinstatement order running against the employer was not raised before the Board or in the court below.²³ Section 10 (e) of the Act provides that "no objection that has not been urged before the Board * * * shall be considered by the court" in the absence of extraordinary circumstances (*National Labor Relations Board v.*

²³ Copies of the Union's brief below and of its brief to the Board in support of its exceptions to the examiner's intermediate report have been lodged with the Clerk of the Court. The exceptions are contained in the certified record presently before the Court.

Cheney California Lumber Co., 327 U. S. 385; see also, *United States v. Tucker Truck Lines*, 344 U. S. 33), and this Court will not ordinarily review a question "not properly raised, litigated or passed upon below" (*McCullough v. Kammerer Corp.*, 323 U. S. 327, 328).

2. The Union's contention is in any event without merit. The Board recognizes that, where the employer is not a party to the proceeding, the Board cannot direct the employer to offer reinstatement to the employee discriminated against. Instead, as in this case (R. I. 29), the Board directs the union to inform both the employer and the employee that it has no objection to the employee's reinstatement. In addition, it requires the union to make the employee whole, as nearly as possible, for any loss of pay or deprivation of other benefits of the employment relationship sustained as a result of the discrimination. *Pen and Pencil Workers Union*, 91 NLRB 883, 888-890. The Board holds that the "absence of any reinstatement order against the Employer in no way affects our power to issue a back-pay order against the Union." *George C. Quinley*, 92 NLRB 877, 880.

Under Section 10 (c) of the original Act, the Board was empowered to order an offender "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *." It was held early in the Act's history that the

participial phrase "including reinstatement of employees with or without back pay" did not limit, but merely illustrated, the general grant of power to award affirmative relief. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 188-189. It was accordingly settled that, even without a reinstatement direction, the Board was empowered to enter a back-pay order.²⁴

In 1947, when the Act was expanded to include unfair labor practices by labor organizations, a further illustration was added of the "affirmative action" the Board was empowered to direct. A proviso to the authority to grant affirmative relief was enacted which specifies that:

where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

²⁴ *Phelps Dodge Corp. v. National Labor Relations Board*, 113 F. 2d 202, 205 (C. A. 2), affirmed, 313 U. S. 177, 200; *Indianapolis P. & L. Co. v. National Labor Relations Board*, 122 F. 2d 757, 763 (C. A. 7), certiorari denied, 315 U. S. 804; *National Labor Relations Board v. Revlon Products Corp.*, 144 F. 2d 88, 90 (C. A. 2); *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, 238-239 (C. A. 8), certiorari denied, 334 U. S. 845; *Reliance Mfg. Co. v. National Labor Relations Board*, 125 F. 2d 311, 321 (C. A. 7); *New York Handkerchief Mfg. Co. v. National Labor Relations Board*, 114 F. 2d 144, 147-148 (C. A. 7), certiorari denied, 311 U. S. 704; *M. H. Ritzwoller Co. v. National Labor Relations Board*, 114 F. 2d 432, 434, note 2 (C. A. 7); *Link-Belt Co. v. National Labor Relations Board*, 110 F. 2d 506, 511, 512 (C. A. 7), affirmed in this respect, 311 U. S. 584.

The Union contends, in effect, that by the words "where an order directs reinstatement of an employee," Congress withdrew the power previously conferred to order back pay without reinstatement. But there is no more justification now than there was before 1947 "for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 189.

The purpose of Congress in enacting the proviso was not to restrict but "to *extend* the power of the Board so as to provide it with a means to remedy union unfair labor practices newly established by the Labor Management Relations Act, comparable to the means it already had to remedy the employer unfair labor practices established by the National Labor Relations Act." *H. N. Newman*, 85 NLRB 725, 732 [enforced, 187 F. 2d 488 (C. A. 2)]." *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1015 (C. A. 7), certiorari denied, 342 U. S. 815. It "plainly was intended merely to make an express extension of the power of the Board to order back pay, to include labor organizations, as well as employers, where they engaged in unfair labor practices under the Act." *National Labor Relations Board v. J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8). In recognition of the non-restrictive character of the proviso, it

has been held that, despite the words "employer or labor organization," the Board is empowered to assess each of them with joint and several liability for back pay where both are responsible for discrimination, and that the Board is not confined to a compulsory choice between the two.²⁸ Similarly, despite the word "discrimination," which arguably confines an order of back pay and reinstatement to the unfair labor practice of discrimination defined in Sections 8 (a) (3) and 8 (b) (2), the Board retains the authority to order back pay and reinstatement for the unfair labor practice of interference, restraint and coercion defined by Section 8 (a) (1) of the Act.²⁹ And so in this case, despite the words "where an order directs reinstatement," the Board has authority to order back pay without reinstatement. For the words of the proviso are "casual description only, and not an injected limitation," of the Board's authority to order affirmative action effectuating the policy of the Act. *National Labor Relations Board v. J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8).

²⁸ *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1013-1015 (C. A. 7), certiorari denied, 342 U. S. 815; *H. M. Newman*, 85 NLRB 725, 730-733, enforced, 187 F. 2d 488 (C. A. 2); *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1013-18, enforced, 192 F. 2d 524, 528 (C. A. 7); *National Labor Relations Board v. Newspaper and Mail Deliverers' Union*, 192 F. 2d 654, 656 (C. A. 2).

²⁹ *National Labor Relations Board v. J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8).

Had it been Congress' purpose to withdraw from the Board the authority to award back pay without reinstatement, an aspect of the Board's remedial power which at the time of the 1947 amendments was settled and judicially approved (*supra*, pp. 55-56), we should expect to find at least a history of dissatisfaction with its use and an expression of a desire to discontinue it. Instead, insofar as the legislative history lends itself to any inference, it discloses a desire to leave the Board's remedial authority unfettered. Thus, a provision in the House bill²⁷ which would have restricted a Board order to the relief requested in the complaint was not accepted by the conferees.²⁸ Similarly, a provision in the House bill specifying a particular remedy in non-back-pay cases, and thereby implying a restriction of the Board to that remedy in such cases, was deleted by the conferees, who explained that Congress should not "by implication, limit * * * the Board in its choice of remedial orders * * *."²⁹ Rejecting such limitations, the conferees adopted the language of the Senate amendment which expressly preserved the broad wording of the original Act authorizing the Board "to take such affirmative action as will effectuate the policies of this Act," and which also contained in the proviso the reference to union liability for back pay, as

²⁷ H. R. 3020, 80th Cong., 1st Sess., in 1 Leg. Hist. 68, 195.

²⁸ H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 54.

²⁹ *Ibid.*

it now reads.³⁰ This history "shows a determination to maintain the full scope of administrative discretion * * * in fitting remedies to violations." *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1014 (C. A. 7), certiorari denied, 342 U. S. 815.

Finally, to limit back pay only to the situation where reinstatement is also directed would work absurd results. It would mean, for example, that back pay could not be awarded (1) when the employee has found a better job and does not wish to be reinstated; (2) when the employee has incurred an intervening physical disability and is not qualified for reinstatement; (3) when he has been reinstated prior to the Board's order but has not received back pay for the period during which the discrimination persisted; or (4) when the employer has since discontinued his business so that there is no longer a job to which the employee can be reinstated.

It is clear, therefore, that the proviso is intended to illustrate, not to limit, the affirmative action the Board is authorized to order, and that the Board may issue a back pay order against the union without a companion reinstatement remedy against the employer.

³⁰ S. Rep. No. 105, 80th Cong., 1st Sess., 38; see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 13.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

✓ WALTER J. CUMMINGS, Jr.,
Solicitor General.

✓ GEORGE J. BOTT,
General Counsel,

✓ DAVID P. FINDLING,
Associate General Counsel,

✓ MOZART G. RATNER,
Assistant General Counsel,

✓ BERNARD DUNAU,

✓ ELIZABETH W. WESTON,

✓ LOUIS SCHWARTZ,
Attorneys,
National Labor Relations Board.

JANUARY 1953.

INDEX

	Page
I. Introduction	2
II. Where discrimination is based on an employee's union membership, activity, or want of either, and encouragement or discouragement of union membership is reasonably inferable, Section 8(a)(3) is violated whether or not the discrimination is motivated by a desire to encourage or discourage membership	5
III. In any event, a purpose to encourage membership in a labor organization was established in <i>Radio Officers and Teamsters</i>	13
A. In both cases the labor organizations had the purpose of encouraging membership in good standing	13
B. Enforcement of an agreement conditioning employment on union membership, when the action taken is in excess of that permitted by the agreement, constitutes a violation of Section 8(a)(3) and 8(b)(2) without a showing that the individual act of enforcement had the specific purpose of encouraging membership	16
IV. In <i>Radio Officers and Teamsters</i> , even if the labor organizations did not violate Section 8(b)(2), the conduct in which they engaged nevertheless violated Section 8 (b) (1)(A)	19
Conclusion	25

CITATIONS

Cases:

<i>Acme Mattress Co., Inc.</i> , 91 NLRB 1010, enforced, 192 F. 2d 524	11
<i>Cusano v. National Labor Relations Board</i> , 190 F. 2d 898	3, 11
<i>Eichleay Corp. v. National Labor Relations Board</i> , 32 LRRM 2628	8, 16, 17
<i>Jersey Coast News Company, Inc.</i> , 105 NLRB No. 45, 32 LRRM 1278	4
<i>Morissette v. United States</i> , 342 U.S. 246	6
<i>National Labor Relations Board v. Bell Aircraft Corp.</i> , 32 LRRM 2550	14
<i>National Labor Relations Board v. Gluek Brewing Co.</i> , 144 F. 2d 847	10, 16
<i>National Labor Relations Board v. Hearst Publications</i> , 322 U.S. 111	10
<i>National Labor Relations Board v. Illinois Tool Works</i> , 153 F. 2d 811	25
<i>National Labor Relations Board v. Jarka Corporation</i> , 198 F. 2d 618	9

Cases—Continued

	Page
<i>National Labor Relations Board v. F. H. McGraw & Co.</i> , 32 LRRM 2220	8, 17
<i>National Labor Relations Board v. Newport News Ship- building & Dry Dock Co.</i> , 308 U.S. 241	25
<i>National Labor Relations Board v. Newspaper & Mail Deliverers' Union</i> , 192 F. 2d 654	10
<i>National Labor Relations Board v. Oertel Brewing Co.</i> , 197 F. 2d 59	10
<i>National Labor Relations Board v. Pappas & Co.</i> , 203 F. 2d 569	10
<i>National Labor Relations Board v. Geo. W. Reed, et al.</i> , 32 LRRM 2308	20-23
<i>National Labor Relations Board v. Swinerton</i> , 202 F. 2d 511, certiorari applied for by respondent, No. 72, October Term, 1953	8
<i>National Labor Relations Board v. Whitin Machine Works</i> , 204 F. 2d 883	2
<i>Red Star Express v. National Labor Relations Board</i> , 196 F. 2d 78	17
<i>Republic Aviation Corporation v. National Labor Rela- tions Board</i> , 324 U.S. 793	23, 24
<i>Salt River Valley Water Users' Association v. National Labor Relations Board</i> , 32 LRRM 2598	11
<i>Swift & Co. v. United States</i> , 196 U.S. 375	18
<i>United States v. Aluminum Company of America</i> , 148 F. 2d 416	18
<i>United States v. Socony-Vacuum Oil Company</i> , 310 U.S. 150	18
<i>Warehousemen's Union, Local 117 v. National Labor Re- lations Board</i> , 121 F. 2d 84, certiorari denied, 314 U.S. 674	18

Statutes:

<i>National Labor Relations Act (Act of July 1935, 49 Stat. 449, 29 U.S.C., 151, et seq.):</i>	
Section 8 (1)	25
Section 8 (3)	2, 17
<i>National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, et seq.):</i>	
Section 7	19
Section 8 (a) (1)	25
Section 8 (a) (3)	2, 4, 5, 6, 7, 9, 10, 12, 15, 17
Section 8 (b) (1) (A)	4, 19, 23
Section 8 (b) (2)	4, 12, 14, 15, 19

Miscellaneous:

H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21	9
H. Rep. No. 245, 80th Cong., 1st Sess.	13
S. Rep. No. 1184, 73rd Cong., 2d Sess., p. 6	9

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 5

THE RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 6

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 7

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD ON REARGUMENT

On May 25, 1953, the Court ordered these cases restored to the docket for reargument. 345 U.S.

(1)

962. The National Labor Relations Board submits this supplemental brief to aid in the consideration of the issues common to the three cases.

I

Introduction

Section 8 (a) (3) of the amended National Labor Relations Act, like Section 8 (3) of the original Act, makes it an unfair labor practice for an employer "by discrimination in * * * employment * * * to encourage or discourage membership in any labor organization * * *." This provision is linked with Section 8 (b) (2) of the amended Act, which makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *."

In the Board's original briefs, the position taken is that a violation of Section 8 (a) (3) is established when it is shown (1) that the action directed against the employee constitutes discrimination in employment, and (2) that it is reasonably inferable from the character of the discrimination that its tendency is to encourage or discourage union membership.¹ In *Radio Officers*, the dis-

¹ Recently, in *National Labor Relations Board v. Whittin Machine Works*, 204 F. 2d 883, 884-885 (C.A. 1), the Court of Appeals for the First Circuit, dealing with an unlawful discharge for union activity, formulated the elements of the offense in the following terms:

When a charge is made that by firing an employee the employer has exceeded the lawful limits of his right to manage and to discipline, substantial evidence must be adduced to support at least three points. First, it must be shown that the employer knew that the employee was

crimination practiced was the refusal to clear an employee for employment with the Company because of the employee's failure to adhere to the system of hiring prescribed by the Union's rules; in *Teamsters*, the discrimination practiced was the reduction of an employee's seniority because of delinquency in the payment of dues to the labor organization where no valid union-security agreement was in effect authorizing compulsory dues payment; in *Gaynor*, the discrimination practiced was withholding wage and vacation benefits from nonmembers of the labor organization, solely because of their status as nonmembers, while granting these benefits to union members who, except for their membership status, were in the same position as the nonmembers. In each case it was reasonably inferable that the discrimination tended to encourage union membership; in all three cases employees would be encouraged to acquire or retain union membership, and in *Radio Officers* and *Teamsters* employees would in addition be encouraged to maintain their membership in good standing. Finally, the elements of discrimi-

engaging in some activity protected by the Act. Second, it must be shown that the employee was discharged because he had engaged in a protected activity. [Citations] Third, it must be shown that the discharge had the effect of encouraging or discouraging membership in a labor organization. [Citation] The first and second points constitute discrimination and the practically automatic inference as to the third point results in a violation of § 8 (a) (3). See *National Labor Relations Board v. Gaynor News Co.*, 197 F. 2d 719, 722 (2 Cir. 1952), cert. granted 345 U.S. 902 (1953); But cf. *National Labor Rel. Bd. v. Reliable Newspaper Del.*, 187 F. 2d 547 (3 Cir. 1951).

As to the quantum of knowledge the employer must have, see *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3).

nation and its union-encouraging tendency having been established, we sought to show in *Gaynor* that it was immaterial that the Company guilty of the discrimination did not have as its purpose the encouragement of union membership. (Bd. brief in *Gaynor*, pp. 24-33.)

This brief will not treat, except incidentally, with the factors of discrimination and its union-encouraging tendency² as exemplified in these cases. Instead, in this brief (1) we shall amplify our position that a purpose or desire to encourage or discourage membership need not be shown to establish a violation of Section 8(a)(3); (2) on the assumption that purpose is material, we shall show that this factor is present in *Radio Officers* and *Teamsters*; and (3) whatever the result in *Radio Officers* and *Teamsters* may be insofar as the violation of Section 8(b)(2) there found depends on the interpretation of Section 8(a)(3), we shall show that the conduct engaged in by the labor organizations in these cases is independently violative of Section 8(b)(1)(A).

² In *Gaynor*, petitioner contended that its discrimination was incapable of encouraging membership because the employees victimized by the discrimination were ineligible for membership in the labor organization. In rejecting this contention, the court below explained (R. 125): "A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination." This observation has since proved correct. In 1952, the Union changed its admission policy and now admits to membership "all steady situation holders" (that is, persons regularly employed), and many employees previously ineligible have acquired membership. *Jersey Coast News Company, Inc.*, 105 NLRB No. 45, 32 LRRM 1278.

II

Where Discrimination Is Based on an Employee's Union Membership, Activity, or Want of Either, and Encouragement or Discouragement of Union Membership Is Reasonably Inferable, Section 8(a)(3) Is Violated Whether or Not the Discrimination Is Motivated By a Desire To Encourage or Discourage Membership

The language employed by Congress in Section 8(a)(3)—forbidding an employer “by discrimination in * * * employment * * * to encourage or discourage membership”—does not suggest that violations can occur only where the employer engaged in discrimination has as his purpose the encouragement or discouragement of membership. We have shown in our original briefs that where, as in these cases, discrimination against an employee is based solely and precisely on nonmembership in a union (or, what we believe is the same thing, failure to adhere to a membership rule which is requisite to maintenance of membership in good standing), the attraction of union membership is enhanced and membership is encouraged. Where this occurs, it does not matter that the reason for the discrimination—the motive or purpose of the employer effecting the discrimination—may not have been to encourage membership. The employer may be motivated by a union's threats or other pressure, or by some real or fancied economic necessity. The fact remains that the discrimination falls squarely within the statute, which makes it unlawful “by discrimination in * * * employment * * * to encourage or discourage membership in any labor organization * * *.”

Had Congress intended that a purpose to en-

courage or discourage membership be an essential element of the unfair labor practice in Section 8(a)(3), it would have been a simple matter to phrase the prohibition in unambiguous terms to make it unlawful "to discriminate in employment *in order* to encourage or discourage membership" or "*for the purpose of* encouraging or discouraging membership." However, instead of using the words "to encourage or discourage membership" as descriptive of the actor's subjective purpose, Congress used them to describe the *condition* which the actor was not to bring about, and forbade the creation of this condition "by discrimination in * * * employment." It is the fact of encouragement or discouragement by the forbidden means of discrimination which is relevant to Congress' aim.

We do not argue that, as a bare matter of language, the words Congress used could not be limited to cases where the party effecting the discrimination had as his purpose encouragement or discouragement of membership. But the language requires no such restriction, and the congressional objective argues decisively against it. Even where statutes define "public welfare offenses" to which criminal sanctions attach, the distinguishing characteristic of such enactments is that answerability for conduct abridging the protected interest is fixed without regard to "evil purpose or mental culpability," for the statutory offense "depend[s] on no mental element but consist[s] only of forbidden acts or omissions." *Morissette v. United States*, 342 U. S. 246, 252-253, and the discussion *passim*

pp. 252-260. *A fortiori*, under the remedial scheme of the National Labor Relations Act, one who engages in discrimination in employment which in fact encourages or discourages membership in a labor organization is guilty of the practice Congress proscribed whether or not it is his purpose or desire to effect such encouragement or discouragement.

The only substantial reason for introducing a purpose requirement would be a showing that it was necessary to prevent Section 8(a)(3) from reaching conduct outside the mischief at which Congress aimed. But no such showing is possible. It may be urged that many innocent acts can encourage or discourage union membership. A non-union employer's fair and generous labor policy may discourage membership in a labor organization aspiring to represent the employees, and a union's vigorous and impartial defense of the interests of all employees may encourage membership in it; yet it is obvious that neither situation was intended to fall within the ban of Section 8(a)(3). It is equally obvious, however, that there is no need to insert a purpose requirement to conclude that conduct of the type in question is not touched by Section 8(a)(3). For by its terms the only condition of union encouragement or discouragement which the section prohibits is that which is effected "by discrimination in * * * employment." It is never enough in establishing a violation to show conduct which encourages or discourages union membership; it is essential to show that the conduct constitutes "discrimination in employment." Nor are

we concerned with discriminatory employment practices at large; the discrimination must be of a type which puts an employee at a disadvantage in some incident of employment by virtue of his union membership, activity, or want of either. Inquiry centered on whether conduct is discriminatory in this sense provides a realistic basis for determining whether or not it is within the evil apprehended by Congress.³

Accordingly, in each of the present cases, to determine whether the action encouraging union membership was unlawful, the critical issue is whether the encouragement resulted from the kind of discrimination in employment Congress sought to reach in Section 8(a)(3). We have shown in *Radio Officers* that the closed-shop system of hiring there involved, restricting employment to union members, was specifically outlawed by Congress in the amended Act, and that the discrimination based on that system was within the evil Congress condemned. (Bd. brief in *Radio Officers*, pp. 21-26, 38-44).⁴ Similarly, the discrimination in *Teamsters* was squarely denounced by Congress when it provided that control over employment to compel

³ As explained in the Board's brief in *Gaynor* (pp. 30-33), purpose may be relevant in determining whether an act is discriminatory. For example, where the issue is whether an employee has been discharged because of poor production or because of union activity, it is necessary to determine whether the employer's purpose was to maintain efficiency (in which case the discharge is not discriminatory), or whether the employer's purpose was to defeat union activity (in which case the discharge is discriminatory).

⁴ See also, *National Labor Relations Board v. F. H. McGraw & Co.*, 32 LRRM 2220 (C.A. 6, June 4, 1953); *National Labor Relations Board v. Swinerton*, 202 F. 2d 511 (C.A. 9), certiorari applied for by respondent, No. 72, October Term, 1953; *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628 (C.A. 3, August 26, 1953).

union dues payment could be exercised only pursuant to a valid union-security agreement. (Bd. brief in *Teamsters*, pp. 13-26.)⁵ And in *Gaynor*, the discrimination practiced was precisely that envisaged by the House Report on the original Act when it stated that "agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization.' " H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. The Senate Labor Committee expressed the same view when it explained the reach of an earlier but virtually identical version of Section 8(3) of the Wagner Act;⁶ after first stating that an employer "ought not to be free" to discharge or refuse to hire an employee because of his union membership, it went on to say (S. Rep. No. 1184, 73d Cong., 2d Sess., p. 6):

Nor should an employer be free to pay a man a higher or lower wage solely because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers.

As exemplified by the present cases, therefore, Section 8(a)(3) is confined to Congress' objective without reading into it a requirement of showing a purpose or desire to encourage or discourage

⁵ See also, *National Labor Relations Board v. Jarka Corporation*, 198 F. 2d 618 (C.A. 3) (it is an unfair labor practice to fail to clear for employment "a union member delinquent in the payment of his dues" (p. 619) pursuant to a "practice of 'securing' preferential hiring for union men in good standing" (p. 620)).

⁶ See Bd. brief in *Gaynor*, p. 15, n. 9.

membership. For the fact of encouragement does not alone suffice to establish a violation; it must be the consequence of "discrimination in employment," and this crucial term acquires its meaning and its limitations from "the mischief to be corrected and the end to be attained." *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 124.

We think it clear, in short, that the absence of a showing of a purpose or desire to encourage or discourage union membership does not leave the reach of Section 8(a)(3) at large. On the other hand, insistence upon such a showing would hobble its effectiveness. For example, it is settled that an employer violates Section 8(a)(3) even if he does not intend the union-encouraging or discouraging effect of his discrimination but instead acts only under the pressure of economic hardship.⁷ Yet this rule could not have evolved if a union-encouraging or discouraging purpose were abstracted from Section 8(a)(3) as a controlling circumstance. The rule came into being because the issue was not conceived as one of culpable versus innocent intent; rather, it was conceived as a question of accommodating competing interests, and the employee's statutory interest in being free from discrimination was held superior to the employer's plea for

⁷ *National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C.A. 8), and cases cited. For recent illustrations, see *National Labor Relations Board v. Newspaper & Mail Deliverers' Union*, 192 F. 2d 654, 656 (C.A. 2); *National Labor Relations Board v. Oertel Brewing Co.*, 197 F. 2d 59, 62 (C.A. 6); *National Labor Relations Board v. Pappas & Co.*, 203 F. 2d 569, 570 (C.A. 9).

immunity based on the exigency of his situation.⁸

The *Gaynor* case, we think, aptly illustrates the unrealistic consequences of the contrary view—that, regardless of discrimination based on union membership alone, and regardless of whether the result in fact is encouragement of membership, the employer should be immune unless he sought or desired to effect such encouragement. The Company contends that it should not be held responsible for the union-encouraging effect of its discrimination against nonmembers, solely (it is conceded) because of their nonmembership; it argues that it was indifferent to the union-encouraging effect of

⁸ See *Acme Mattress Co., Inc.*, 91 NLRB 1010, 1015-1017, enforced, 192 F. 2d 524, 528 (C.A. 7).

Compare the analogous accommodation illustrated by *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3):

Petitioner [the employer] urges as an alternative argument that whether or not a discharged employee actually * * * [engaged in misconduct in the course of participating in protected activity] is irrelevant so long as the employer reasonably believes he did and so long as the employer actually discharges the employee on the strength of that belief. It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. *N.L.R.B. v. Condenser Corp.*, 3 Cir., 1942, 128 F. 2d 67, 75; *N.L.R.B. v. Electric City Dyeing Co.*, *supra* [178 F. 2d 980 (C.A. 3)]. This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. * * * To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge.

Accord: Salt River Valley Water Users' Association v. National Labor Relations Board, 32 LRRM 2598, 2601 (C.A. 9, July 23, 1953).

its discrimination, its "only interest" being its "normal and understandable desire to avoid making payments which [it] felt [it] was not legally obligated to make." (Br. for Gaynor, p. 14.) But if the standard for differentiation which it adopted constituted "discrimination in employment" within the meaning of Section 8(a)(3)—the critical issue—then the Company's claim of innocent intention reduces to the assertion that it was economically more profitable for it to operate in disregard of its statutory obligation than in conformity with it. In this sense the Company's motive is not different from that of most offenders. It is the rare person who is activated by unalloyed animus rather than by a desire to promote his economic interests. We therefore grant that the Company's purpose was to save money rather than to encourage union membership as such; but this is hardly an extenuating motive if its method of saving money otherwise offends the requirements of Section 8(a)(3).

Implicitly recognizing that an employer may unlawfully encourage union membership by forbidden discrimination under Section 8(a)(3) even though it is not the purpose or desire of the employer to accomplish such encouragement, Congress, in Section 8(b)(2) of the amended Act, made it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *." As we have shown in our original brief in the *Teamsters* case (pp. 12-26), Congress was concerned in this provision with what it regarded as excessive and abusive control by unions over employment through enforcement

of closed-shop agreements. Relevant at the moment is the recognition by Congress of the well-known fact that employers have frequently been forced in the exigencies of bargaining or by other pressure to yield to unions such control over employment. Congress knew, in a word, that employers could be "caused" "to discriminate against an employee in violation of subsection (a)(3) * * *." And this without regard to whether the employer wished—had as his own purpose—to encourage union membership. Because the employer's subjective attitude is not the material issue, Congress aptly described the employer conduct a union was forbidden to cause as *discrimination* "in violation of subsection (a)(3)"—*i. e.*, discrimination which is based upon union membership or activity and which results in fact in encouragement or discouragement of membership.

III

In Any Event, a Purpose To Encourage Membership in a Labor Organization Was Established in *Radio Officers and Teamsters*

A. In Both Cases the Labor Organizations Had the Purpose of Encouraging Membership in Good Standing

In our brief in *Teamsters* (pp. 28-36), we showed that the term "membership in any labor organization" embraces membership in good standing,⁹ a status which is maintained by the faithful

⁹ Thus, the House Report stated that "The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union *in good standing* when the employer hires him." H. Rep. No. 245, 80th Cong., 1st Sess., p. 33 (emphasis supplied).

performance of membership obligations. See also, *National Labor Relations Board v. Bell Aircraft Corp.*, 32 LRRM 2550, 2553 (C. A. 2, Aug. 11, 1953). In both *Radio Officers* and *Teamsters*, where the labor organizations were found to have violated Section 8(b)(2) by causing the employers to discriminate in violation of Section 8(a)(3), the palpable purpose of the labor organizations' conduct was to encourage membership in good standing. In *Radio Officers*, a prerequisite for maintaining membership in good standing was compliance with the labor organization's rule prescribing the method of hiring to be followed by a member in obtaining work, and the sanction imposed on a member for breach of this rule was refusal to clear him for employment with the Company. In *Teamsters*, a prerequisite for maintaining membership in good standing was timely payment of union dues, and the sanction imposed for a member's breach of this rule was reduction in his seniority. In each case, therefore, the plain purpose of the labor organization's conduct was to encourage membership in good standing, for in imposing a sanction for the breach of a membership rule there can be no other intent than to encourage membership in good standing.

It may be urged that it is not enough to show that the labor organization entertained the proscribed purpose: The offense under Section 8(b)(2) is for the labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)"; accordingly, the argument might run, the labor

organization's liability depends on a violation of Section 8(a)(3), which cannot be effected unless the employer himself entertains the proscribed purpose. Compare pp. 12-13, *supra*. This would be a stultifying interpretation in terms of the evil at which Congress aimed. If the mischief to be corrected is purposeful encouragement of membership by discrimination in employment, that mischief is fully manifested if the labor organization alone entertains the prohibited purpose; its impact is not diminished because the employer as the instrument by which the union effects its end does not share the union's purpose. The employer's lack of purpose might, we assume here, be a defense to him if he is charged with a violation of Section 8(a)(3), but even as a matter of the most literal reading of Section 8(b)(2), this would still leave the labor organization chargeable with an "attempt to cause" a Section 8(a)(3) violation. A finding of an 8(b)(2) violation on the footing of an "attempt" would still require the labor organization fully to remedy whatever harm its "attempt" caused.

Furthermore, it is not even true that the employer under these circumstances is not chargeable with a violation of Section 8(a)(3). With knowledge or reason to know the basis of the union's request, the employer has the choice of either acquiescing in the request—thereby promoting purposeful encouragement of membership—or of resisting the request—thereby safeguarding the employee's interests. When the employer acquiesces, he aids in effectuating the union's purpose to the detriment of the employee's interests, however

reluctant, unenthusiastic, or constrained he may feel. The employer may have "had no purpose—in the sense of animus or desire—to injure one or to help the other" (*National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8)), but it is the settled rule, from which no court has deviated, that an employer's acquiescence in a union's request, even under the compulsion of economic pressure, does not relieve the employer of responsibility (*supra*, pp. 10-12). Unless this rule is to be undone, the employer does violate Section 8 (a) (3) (see *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628, 2631-34 (C.A. 3, August 26, 1953), and the union cannot therefore plead the absence of a violation on the employer's part as a defense to a charge that it has violated Section 8 (b) (2).

B. Enforcement of an Agreement Conditioning Employment on Union Membership, when the Action Taken Is in Excess of That Permitted by the Agreement, Constitutes a Violation of Section 8 (a) (3) and 8 (b) (2) without a Showing that the Individual Act of Enforcement Had the Specific Purpose of Encouraging Membership

There is an additional ground in *Radio Officers*, still assuming a purpose requirement, for holding that the labor organization violated Section 8 (b) (2). The agreement between the Company and the Union conditioned employment on union membership in good standing, and the discrimination practiced by the Union was in excess of that per-

mitted by this agreement. (Bd. brief in *Radio Officers*, pp. 26-34.) When enforcement of such an agreement goes beyond what its terms authorize, the action taken violates Section 8 (a) (3) and 8 (b) (2) without the need for showing that the individual act of enforcement had the specific purpose of encouraging union membership.

When Congress made it an unfair labor practice "by discrimination in * * * employment * * * to encourage * * * membership in any labor organization," Congress was aware that it invalidated any system of employment in which hire or tenure was conditioned on union membership, for the manifest objective of such an arrangement is to encourage membership. (Board brief in *Radio Officers*, pp. 21-26.) To save such arrangements from total invalidation, Congress inserted provisos in both Section 8 (3) of the original Act and Section 8 (a) (3) of the amended Act permitting under specified limitations the "making" of an agreement conditioning employment on union membership. If the "making" does not comply with the specified limitations, the mere execution of such an agreement without more violates Section 8 (a) (3) and 8 (b) (2). *Red Star Express v. National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board v. F. H. McGraw & Co.*, 32 LRRM 2220, 2225 (C.A. 6, June 4, 1953); *Eichleay Corp. v. National Labor Relations Board*, 32 LRRM 2628, 2632 (C.A. 3, August 26, 1953). Any supposed requirement that the execution of the agreement must be shown to have for its purpose encouragement of membership is satisfied by the very character of such agreements, which bear no rea-

sonable interpretation other than that their necessary effect of encouraging membership is their intended effect as well. A showing of specific intent underlying the particular agreement is not necessary. Specific intent is not requisite where the acts are "sufficient in themselves to produce a result which the law seeks to prevent" (*Swift & Co. v. United States*, 196 U. S. 375, 396)—in this case control over employment based on union membership except in compliance with the conditions Congress has laid down. Such agreements in effect confer a monopoly, and the law properly assumes that "no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Company of America*, 148 F. 2d 416, 432 (C.A. 2).

Enforcement of a union-security agreement beyond what its valid terms permit stands on the same footing as the making of an invalid agreement in the first instance. Since Congress has made the validity of a union-security agreement depend "upon the existence of the conditions prescribed by the statute for giving such an agreement effect" (*Warehousemen's Union, Local 117 v. National Labor Relations Board*, 121 F. 2d 84, 87 (C.A. D.C.), certiorari denied, 314 U.S. 674), its valid enforcement likewise depends upon compliance with its terms. "For Congress had specified the precise manner and method of securing immunity. None other would suffice." *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 226-227.

IV

In *Radio Officers and Teamsters*, Even if the Labor Organizations Did Not Violate Section 8 (b) (2), the Conduct in Which They Engaged Nevertheless Violated Section 8 (b) (1) (A)

In the Board's briefs in *Radio Officers* (pp. 11, 35-36, 41-44) and *Teamsters* (pp. 7-8, 9, 43-44), we showed that, apart from whether the labor organizations had violated Section 8 (b) (2) of the Act, the Board properly found that the conduct in which they engaged was independently violative of Section 8 (b) (1) (A).¹⁰

The basis for the Board's holding that the labor organizations violated Section 8 (b) (1) (A), whether or not they also violated Section 8 (b) (2), may be summarized as follows: Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 of the Act guarantees employees the right "to refrain" from assisting labor organizations or engaging in concerted activities for mutual aid or protection except as the right to refrain is limited by a valid union-security agreement. In *Teamsters*, no valid union-security agreement existed; in *Radio Officers*, the action taken was unauthorized by the union-security

¹⁰ In *Gaynor*, the Board found that the Company violated Section 8 (a) (3) of the Act, "thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act" (R. 29). Since the Board's finding of an 8 (a) (1) violation is thus dependent on its finding of an 8 (a) (3) violation, we do not discuss whether in *Gaynor*, apart from its violation of 8 (a) (3), the Company independently violated 8 (a) (1).

agreement; in both cases, therefore, abridgment of the right to refrain was not privileged by an agreement. In *Teamsters*, the employee failed to pay his union dues on time and to that extent refrained from assisting the labor organization; the reduction in his seniority for delinquency in paying his dues was restraint and coercion of him in exercising his right to refrain. In *Radio Officers*, the employee failed to comply with the union's rule concerning the method of obtaining employment and to that extent refrained from assisting the labor organization or engaging in its concerted activities; the refusal to clear the employee for employment with the Company because of his conduct was restraint and coercion of him in exercising his right to refrain. In both cases, therefore, the labor organizations violated Section 8 (b) (1) (A) of the Act independently of whether they also violated Section 8 (b) (2).¹¹

The soundness of this analysis is squarely supported by the recent decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board v. George W. Reed, et al.*, 32 LRRM 2308 (C.A. 9, June 22, 1953). The Ninth Circuit

¹¹ However, if the labor organization's conduct falls only within the prohibition of Section 8 (b) (1) (A), the orders entered by the Board appear to require refashioning insofar as their provisions are addressed to violations of Section 8 (b) (2). In *Teamsters*, this would mean that part 1(a) and (b) of the Board's order (R. 16) should be reworded to eliminate the portions based on Section 8 (b) (2). In *Radio Officers*, part 1(a) of the decree below (R. II, 90), which corresponds to part 1(a) of the Board's order (R.I., 29), would be deleted. In both cases, the notices to be posted would be correspondingly modified (*Teamsters*, R. 21; *Radio Officers*, R. I., 38, R. II, 92).

stated the pertinent facts in that case to be that (32 LRRM at 2311):

Ernest Sydney Charlton, for almost fifty years, has been and still is a member of the respondent Union (International Hod Carriers, Building & Common Laborers Union). In 1949, he was hired by [the employer] Reed as a hod-carrier without first getting clearance from his Union, despite his knowledge of the Union rule requiring him to do so. When the Union discovered his breach, it threatened to take all the hodcarriers off the job unless Reed discharged Charlton. Reed bowed to the Union's demand although he had entered into no union-security contract with the Union.

Evidently following the reasoning of the Eighth Circuit in *Teamsters*, the Ninth Circuit held that these facts failed to support the Board's findings that the employer had violated Section 8 (a) (3) and the union Section 8 (b) (2), for "the record shows that Charlton [the employee] was already a Union member and that the discharge caused no change in his Union status."¹² 32 LRRM at 2312. The Ninth Circuit nevertheless held that these facts supported the Board's independent findings that

¹² In the Board's brief in *Teamsters* (pp. 27-43), we have sought to show the fallacy of this approach, which, to summarize, consists of (1) the failure to apprehend that "membership in any labor organization" as used in Section 8 (a) (3) embraces membership in good standing; (2) the failure adequately to evaluate the influence on joining and remaining in a union which is exerted by the union's display of its power over employment; and (3) the failure to appreciate that only a tendency to induce or dissuade from membership need be shown, not an actual change in the union status of any particular employee.

the employer had violated Section 8 (a) (1) and the union Section 8 (b) (1) (A). It explained that (32 LRRM at 2312):

Section 8 (a) (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. And Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce" employees in the exercise of their rights under Section 7. Among the rights guaranteed by Section 7 are: the right to self-organization and to form, join, or assist labor organizations, and "the right to refrain from any or all of such activities except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment" as authorized by Section 8 (a) (3).

Since no union-security agreement was in effect between Reed and the Union under the provisions of Sections 7 and 8 (a) (3) at the time of Charlton's discharge, his employment by Reed must in no way depend upon his Union status. For, to the extent that Charlton disobeyed the Union's rules, he was refraining from assisting a labor organization. His right to so conduct himself without fear of losing his job is guaranteed by Section 7. Accordingly, the finding of the Board that the Union, in securing Charlton's discharge, and Reed, in firing Charlton for failure to obey Union rules, was a violation of Section 8 (a) (1) and 8 (b) (1) (A) in that they coerced him in the exercise of his rights guaranteed by

Section 7, is supported by the law and the facts. Whether the coercion was or was not successful in accomplishing its object ¹⁷ [I.e., compliance with union clearance rules] is irrelevant. Its use was sufficient to constitute an unfair labor practice.

Thus, insofar as a violation of Section 8 (b) (1) (A) is concerned, the Ninth Circuit's decision in *Reed* is on all fours with the Board's position in *Radio Officers and Teamsters*.

Assuming it to be true (as we shall show is not the case) that a purpose to restrain or coerce employees is essential to a Section 8 (b) (1) (A) violation, the labor organizations in *Radio Officers* and *Teamsters* unquestionably had the requisite purpose. In both cases the employees failed to adhere to the union rules, and the sanctions visited upon them had the precise purpose of punishing the past default and of constraining future obedience.

But even if that were not the purpose, it would make no difference. For in Section 8 (b) (1) (A) Congress was concerned with safeguarding employees from conduct which abridges their exercise of guaranteed rights, whatever the motive for the infringement. This was settled in *Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793, ¹³ insofar as acts by an employer "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed

¹³ In the Board's brief in *Gaynor* (pp. 25-27), we showed that another part of the decision in *Republic Aviation* makes it clear that purposeful encouragement or discouragement of union membership need not be shown to make out a violation of Section 8 (a) (3).

in section 7" in violation of Section 8 (a) (1) of the Act (then Section 8 (1)); and on this subject there is no relevant difference between interference, restraint, and coercion by an employer and restraint and coercion by a labor organization. In *Republic Aviation*, the employer adopted a rule against any solicitation on its premises and, "without any animus against unions, general or particular,"¹⁴ enforced the rule impartially against solicitation of union membership within the plant during nonworking time. And so the question emerged whether such a rule, to which "no union bias or discrimination by the company" attached (324 U.S. at 797), was of itself an abridgment of the employee's organizational rights. This Court held the rule invalid, despite the absence of any purpose on the part of the employer to use the rule to deter organization, for the issue was conceived to be one of "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Id.* at 797-798. Considered in that light, the question was whether the rule could be squared with the "right of employees to organize for mutual aid without employer interference" (324 U.S. at 798); since the "rule against solicitation was considered inimical to the right of organization" (324 U.S. at 801), it did not matter that the employer's purpose in promulgating it was benign. Thus the "test of in-

¹⁴ The quoted statement is from the Second Circuit's decision affirmed by this Court in *Republic Aviation*, 142 F. 2d 193, 195.

terference, restraint and coercion under § 8 (1) of the Act [now Section 8 (a) (1)] does not turn on the employer's motive * * *." ¹⁵ *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). Neither does the test of restraint and coercion under Section 8 (b) (1) (A) turn on the labor organization's motive.

CONCLUSION

It is respectfully submitted that the decisions below in *Radio Officers* and *Gaynor* should be affirmed and the decision below in *Teamsters* reversed.

✓ ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

✓ DOMINICK L. MANOLI,
Assistant General Counsel,

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

SEPTEMBER, 1953.

¹⁵ Similarly, as to a violation of Section 8 (a) (2), the employer's "good motives" are immaterial. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 301

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, OVER-THE-ROAD AND CITY TRANS-
FER DRIVERS, HELPERS, DOCKMEN AND WARE-
HOUSEMEN, LOCAL UNION NO. 41, A. F. L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A. for the Eighth Circuit.....		
Certificate of the National Labor Relations Board.....	1	1
Proceedings before National Labor Relations Board.....	3	2
Charge.....	3	2
Complaint.....	5	4
Notice of hearing.....	9	6
Notice of intention to amend complaint.....	9	7
Answer of respondent to complaint.....	10	7
Order designating trial examiner.....	11	8
Telegram from Counsel for Union requesting extension of time to file brief.....	11	9
Telegram from Chief Trial Examiner granting extension of time to file brief.....	12	9
Order transferring case to National Labor Relations Board.....	12	9
Letter dated January 23, 1951, from John J. Manning to Frank Kleiler requesting opportunity to argue orally....	13	10
Statement of exceptions of respondent to intermediate report of trial examiner.....	14	10

I

Proceedings before National Labor Relations Board—Con.	Original	Print
Decision and order of National Labor Relations Board, June 26, 1951.....	17	13
Dissenting, Abe Murdock, Member.....	23	17
Appendix A—Form of notice pursuant to a Decision and Order.....	26	20
Intermediate report and recommended order, Janu- ary 18, 1951.....	28	22
Appendix A—Form of notice posted suggested by Intermediate report.....	38	30
Petition for enforcement of an order of the National Labor Relations Board.....	39	31
Appendix A—Form of notice posted etc. (Copy) (Omitted in printing).....	43	34
Answer to petition for enforcement.....	44	34
Portions of record printed as an appendix to brief of Interna- tional Brotherhood of Teamsters, etc.....	52	35
Transcript of hearing.....	52	35
Appearances.....	52	35
Testimony of Paul Howard Byers.....	53	35
General Counsel's Exhibit No. 2—Written agree- ment between Byers Transportation Company, Inc. & International Brotherhood of Team- sters, etc.....	55	37
Testimony of James Frank Boston.....	82	54
General Counsel's Exhibit No. 3—Bylaws of International Brotherhood of Teamsters, etc..	88	59
Testimony of Floyd R. Hayes.....	129	74
Respondent's Exhibit No. 1—Excerpts from Con- stitution of the International Brotherhood of Teamsters, etc.....	134	78
Caption.....	150	89
Appearances.....	150	89
Order of submission.....	151	90
Opinion, Thomas, J.....	151	90
Decree.....	156	95
Petition of the National Labor Relations Board for rehearing..	157	96
Order denying petition for rehearing.....	160	99
Clerk's certificate.....	160	99
Order allowing certiorari.....	162	101

1 In United States Court of Appeals for the Eighth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L., RESPONDENT

Certificate of the National Labor Relations Board

Filed September 20, 1951

The National Labor Relations Board, its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L.," the same being known as Case No. 17-CB-36, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Stephen S. Bean Trial Examiner for the National Labor Relations Board, dated November 21, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Bean on November 21, 1950, together with all exhibits introduced in evidence.

2 (3) Respondent's telegram, dated November 30, 1950, requesting extension of time for filing brief before the Trial Examiner.

(4) Copy of Chief Trial Examiner's telegram, dated December 1, 1950, granting all parties extension of time for filing briefs.

(5) Copy of Trial Examiner Bean's Intermediate Report, dated January 18, 1951 (annexed to Item 8 hereof); order transferring case to the Board, dated January 18, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(6) Respondent's letter, dated January 23, 1951, requesting permission to argue orally before the Board. (Denied, see Board's Decision and Order dated June 26, 1951.)

(7) Respondent's exceptions to the Intermediate Report, received February 6, 1951.

(8) Copy of Decision and Order issued by the National Labor Relations Board on June 26, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 14th day of September 1951.

[SEAL]

FRANK M. KLEILER,
Executive Secretary,
National Labor Relations Board.

[File endorsement omitted.]

3

Before National Labor Relations Board

Charge against Labor organization or its agents

Filed August 7, 1950

Form NLRB-508 (12-48)

Budget Bureau No. 64-R003.1

Approval expires November 30, 1949.

Important—Read carefully.

Where a charge is filed by a Labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Do not write in
this space

Case No. 17-CB-36

Date filed 8/7/50

Compliance status
checked by: L. H. M.

Instructions: File an original and 4 copies of this charge with the N. L. R. B. Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor Organization or Its Agents Against Which charge is brought.

Name: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over the Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L.

Address: 116 West Linwood, Kansas City, Missouri.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b), Subsection(s) (1) and (2) of the National Labor Relations Act, and these (List subsections) unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the charge (be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

4 On or about July 1, 1950, the above-named labor organization by its officers, agents and employees caused the Employer named below to terminate the undersigned's seniority and thereby caused the said undersigned to lose wages, for some reasons other than the undersigned's failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

By the acts set forth in the above paragraph, the labor organization by its officers, agents and employees interfered with, restrained, and coerced the employees in the rights guaranteed by Section 7 of the Act.

3. Name of Employer: Byers Transportation Company.

4. Location of plant involved (Street, City, and State) 901 Washington Street, Kansas City, Missouri.

5. Nature of employer's business: Transportation.

6. Number of Workers Employed: 54.

7. Full name of party filing charge: Frank Boston.

8. Address of party filing charge (Street, City, and State), 820 Tauromee, Kansas City, Kansas.

Telephone number: No telephone.

9. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By FRANK BOSTON,

(Signature of representative or person making charge.)

(Title or office, if any.)

AUGUST 7, 1950 (Date).

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

WS/mw 8-7-50

AFFIDAVIT OF SERVICE (omitted in printing)

Before The National Labor Relations Board Seventeenth Region
[Title omitted.]

Complaint

September 8, 1950

It having been charged by Frank Boston, an Individual, hereinafter called the Charging Party, that International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., hereinafter called the Respondent, is engaged in, and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Seventeenth Region, hereby issues this Complaint against Respondent, and alleges the following:

1. The Charging Party is now, and at all times material hereto has been an employee of the Byers Transportation Company, Inc., 901 Washington Street, Kansas City, Missouri, hereinafter referred to as the Employer.

2. The Employer is a Missouri corporation. It is engaged as a common carrier in the motor transportation of commodities between St. Louis, Missouri, and Kansas City, Missouri, and between St. Joseph, Missouri, and Kansas City, Missouri. It operates subsidiary lines from St. Joseph, Missouri, to Leavenworth, Kansas, and Atchison, Kansas. It also occasionally makes full trailer deliveries from points on its regular runs to Wichita, Kansas. It has extensive interline agreements by which commodities are shipped to points beyond its own routes by other common carriers. A substantial portion of the commodities handled by the Employer terminate or originate outside of the State of Missouri. Its operations are subject to regulation by the Interstate Commerce Commission. Its annual gross revenue is in excess of \$1,000,000.

3. The Respondent is now and at all times material hereto has been a labor organization within the meaning of Section 2 (5) of the Act.

4. The Respondent is now and at all times material hereto has been the bargaining representative for the employees of the Employer.

5. The Charging Party is now and at all times material hereto has been a member of the Respondent.

6. At all times material hereto there has been an agreement between the Respondent and Employer and others, commonly known as the "Central States Area Over-the-Road Motor Freight Agreement." This agreement now, and at all times material hereto has constituted the collective bargaining agreement between the Respondent and Employer.

Said agreement, at all times material hereto, contained the following provision:

ARTICLE V

SECTION 1. Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off. In the event of a lay-off, an employee so laid off shall be given two weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement.

7. No election, as provided in Section 8 (a) (3) and Section 9 (e) (1) of the Act, has been held for the unit to which the Charging Party belongs.

8. Section 45 of the Bylaws of the Respondent provides:

Any member, under contract, one month in arrears for dues shall forfeit all seniority rights.

(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues.

Section 44 of the Bylaws provides:

All members who are three (3) months in arrears for dues shall stand suspended and deprived of all rights, privileges and membership, but can be reinstated upon payment of amount of dues.

9. The Charging Party neglected to pay his union dues, for the month of June 1950, to the Respondent, as provided by Section 45 (a) of its Bylaws, set forth above in paragraph 8.

On July 5, 1950, the Charging Party paid both his July 1950 and August 1950 dues to the Respondent. On or about 8 July 15, 1950, because of the Charging Party's failure to pay his June 1950 dues, as provided in Section 45 (a) of the Bylaws, as set forth above in paragraph 8, the Respondent caused the said Charging Party's seniority to be reduced by the Employer from the 18th to the 54th position on the seniority list; that as the result of the Charging Party's loss in seniority he has suffered and continues to suffer financial losses; that the said

Charging Party because of his loss of seniority, as aforesaid, is likely to lose his position with the Respondent.

10. Respondent, by the acts set forth in paragraphs 6, 7, 8 and 9, did attempt to cause and did cause the Employer to discriminate against the Charging Party, and did thereby engage in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

11. Respondent, by its acts set forth in paragraphs 6, 7, 8 and 9, did restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act, and Respondent did thereby engage in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

12. The acts of the Respondent, set forth in paragraphs 6, 7, 8 and 9, occurring in connection with the operations of the Employer, set forth in paragraph 2, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

13. The acts of Respondent, set forth in paragraphs 6, 7, 8 and 9, constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Seventeenth Region, on this 8th day of September 1950 issues this Complaint against the Respondent herein.

[SEAL]

HUGH E. SPERRY,
*Regional Director, National Labor
Relations Board, Seventeenth Region.*

9

Before National Labor Relations Board

Notice of hearing

Please Take Notice that on the 21st day of November 1950 at 10 a. m., at Room 301, Fidelity Building, 911 Walnut Street, Kansas City, Missouri, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to section 203.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within

ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint and Notice of Hearing to be signed by the Regional Director for the Seventeenth Region on this 8th day of September 1950.

[SEAL]

HUGH E. SPERRY,

*Regional Director, National Labor Relations Board,
Seventeenth Region, 1411 Fidelity Bldg., 911 Walnut
St., Kansas City 6, Missouri (Address).*

Before National Labor Relations Board

Notice of intention to amend complaint

September 26, 1950

You Are Hereby Notified of intention to amend the Complaint filed herein by striking the words "July 1950 and August 1950" in line 5 of paragraph 9 on page 4 thereof and substituting therefor "June 1950 and July 1950."

In Witness Whereof, the undersigned Regional Director for the Seventeenth Region of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Intention to Amend Complaint to be issued on this 26th day of September 1950.

[SEAL]

HUGH E. SPERRY,

*Regional Director, National Labor
Relations Board, Seventeenth Region.*

Before National Labor Relations Board

Answer of Respondent

Comes now Respondent and for answer to the complaint herein :

1. Admits the allegation contained in paragraph 1 of said complaint.

2. Neither denies nor affirms the allegations in paragraph 2 of said complaint for the reason that it does not have sufficient knowledge thereof.

3. Admits the allegations contained in paragraphs 3 and 4 of said complaint.

4. Denies the allegations set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, and 13.

Respondent Union further states that the complaint issued herein does not state facts sufficient to give the National Labor Rela-

tions Board jurisdiction of Respondent Union or of the subject matter of this proceeding.

For further answer, Respondent Union states that the right of a labor organization such as Respondent Union to prescribe its own rules with respect to the acquisition or retention of membership therein is protected by a proviso contained in subsection (1) (A) of Section 8 (b) of the National Labor Relations Act, as amended, and that by reason of such proviso the National Labor Relations Board is without jurisdiction to issue and process the complaint herein.

For further answer, Respondent Union states that the rights guaranteed employees by Section 7 of the National Labor Relations Act, as amended, do not include protection of a member of a labor organization from bylaws duly passed by the membership
 11 of such labor organization and that therefore the National Labor Relations Board is without jurisdiction to issue and process the complaint in this matter.

For further answer Respondent Union alleges that he acts, conduct and statements complained of in the said complaint were lawful and protected by Section 8 (c) of the National Labor Relations Act which protection the Respondent Union now invokes.

Having fully answered Respondent Union prays for a finding and order dismissing the complaint for all the reasons herein stated.

CLIF. LANGSDALE,
 JOHN J. MANNING,

Attorneys for Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L.

Before National Labor Relations Board

Order designating Trial Examiner

November 21, 1950

It Is Hereby Ordered that Stephen S. Bean act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 5, of the National Labor Relations Board.

Dated, Washington, D. C., November 21, 1950.

[SEAL]

WILLIAM R. RINGER,
 Chief Trial Examiner.

Before National Labor Relations Board

Telegram from Counsel for Union requesting extension of time to file Brief

WESTERN UNION TELEGRAM

1950 Nov 30 PM 5 20

WZ349 PD=FI Kansas City Mo 30 338P=

12 William Ringer, Chief Trial Examiner, National Labor Relations Board=Federal Security Bldg South 4th And Independence Ave Southwest=

Re Teamsters Local 41 And Frank Boston Case No. 17-CB-36. Transcript Not Yet Received. Request Extension Time File Brief To December 20, 1950=

John J Mannin, Attorney For Union 922 Scarritt Bldg=41 17-CB-36 20 1950=

Before National Labor Relations Board

Telegram from Chief Trial Examiner granting extension of time for Counsel for Union to file brief

TELEGRAM

DECEMBER 1, 1950

JOHN J. MANNING,

922 Scarritt Bldg., Kansas City, Mo.

WILLIAM J. SCOTT,

National Labor Relations Board,
1411 Fidelity Bldg., Kansas City, Mo.

Re International Brotherhood of Teamsters, Case No. 17-CB-36: At the request of Counsel for Respondent Union for extension of time to file briefs, time is hereby extended to December 18, 1950.

WILLIAM R. RINGER,
Chief Trial Examiner.

Before National Labor Relations Board

Order transferring case to the National Labor Relations Board

January 18, 1951

[Title omitted.]

13 A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report and Recommended Order of the said Trial Ex-

aminer, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.

It Is Hereby Ordered, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations, Series 5, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., January 18, 1951.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

NOTE.—Communications concerning compliance with the Intermediate Report should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto.

Before National Labor Relations Board

Letter from Counsel for Union requesting opportunity to argue orally

Clif. Langsdale, Lawyer, 921-24 Scarritt Bldg., Telephone, Victor 9880.

KANSAS CITY, MISSOURI, *January 23, 1951.*

MR. FRANK KLEILER,

*Executive Secretary, National Labor Relations Board,
Federal Security Building South, 4th and Independence
Avenue SW., Washington 25, D. C.*

Re: International Brotherhood of Teamsters Local Union No. 41,
A. F. L. Case No. 17-CB-36

DEAR MR. KLEILER: Respondent Union requests an opportunity to orally argue the above matter before the Board.

Very truly yours,

JOHN J. MANNING.

JJM: aw.

14

Before National Labor Relations Board

*Statement of exceptions of Respondent to Intermediate
Report of Trial Examiner*

Comes now Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., and excepts to the Intermediate Report of Trial Examiner Stephen S. Bean, dated January 18, 1951, as follows:

1. The finding of the Trial Examiner that:

"Clearly the Employer discriminated against Boston when it reduced his seniority."

as stated on page 4 of the Intermediate Report.

2. The finding of the Trial Examiner that:

"The Respondent arrogated to itself the Employer's control over employment, and to use such control to accomplish a clearly discriminatory reduction of Boston's seniority. I find that by its conduct Respondent caused the Employer to discriminate against the Charging Party in violation of Section 8(a) (3) which proscribes unequal treatment of employees in regard to any condition of employment to encourage or discourage membership in any labor organization."

as stated on page 4 of the Intermediate Report.

3. The finding of the Trial Examiner that:

"Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b) (2) of the Act."

as stated on page 4 of the intermediate Report.

4. The finding of the Trial Examiner that:

"Respondent has restrained and coerced and is restraining and coercing employees in violation of Section 8(b) (1) (A) thereof (the Act)."

as stated on page 4 of the intermediate Report.

5. The conclusions of law of the Trial Examiner that:

15 "2. By causing, and attempting to cause, the Employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

"3. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

"4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act."

6. The recommended order of the Trial Examiner that:

"1. Cease and desist from:

"(a) Causing, or attempting to cause, Byers Transportation Company, Inc., its agents, successors, or assigns to reduce the seniority of, or otherwise discriminate against employees in violation of Section 8 (a) (3) of the Act; and

"(b) In any other manner restraining or coercing employees of Byers Transportation Company, Inc. its successors or assigns, in the exercise of the rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed in Section 7 of the Act.

"2. Take the following affirmative action which I find will effectuate the policies of the Act:

"(a) Immediately notify, in writing, Frank Boston at his last known place of residence, and Byers Transportation Company, Inc., that it withdraws its request that Frank Boston's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests said Employer to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges;

"(b) Make whole said Frank Boston for any losses of pay and other incidents of the employment relationship which he may have suffered because of the discrimination against him in the manner described in "The remedy";

16 "(c) Post in conspicuous places in its business offices, and wherever else notices to its members are customarily posted, copies of the notices attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material:

"(d) Mail to said Regional Director signed copies of the notice attached hereto as Appendix A, for posting, the Employer willing, at the office and place of business of the Employer in Kansas City, Missouri, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by said Regional Director, shall, after being duly signed by the Respondent, be forthwith returned to the Regional Director for such posting; and

"(e) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, a report in writing, setting forth in detail the steps which the Respondent has taken to comply herewith."

7. The failure of the Trial Examiner to find that:

(a) The Charging Party had not exhausted his rights under the Respondent Union's Constitution, as that Constitution provides they should do and which Constitution operates as a contract between Respondent Union and its members.

(b) The rights guaranteed to employees under Section 7 of the Act do not include protection from Bylaws of a Local Union imposed by a majority vote of the membership of such union upon its own members in that such Bylaws are part of the contract between labor organizations and their members and which Bylaws the charging party has by contract agreed to abide by.

(c) The right of a labor organization such as Respondent Union to prescribe its own rules with respect to the acquisition or retention of membership is protected by a proviso contained in Subsection (1) (A) of Section 8 (b) of the National Labor Relations Act, as amended, and that by reason of such proviso the National Labor Relations Board is without jurisdiction to issue and process the complaint herein.

8. The failure of the Trial Examiner, upon the motion of the Respondent Union, to dismiss the complaint for the reasons contained in said motion.

Respectfully submitted.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA, OVER-THE-ROAD AND CITY
TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41,
A. F. L.,

CLIF. LANGSDALE,
JOHN J. MANNING,

*Attorneys for Respondent Union, 922 Scarritt Building,
Kansas City 6, Missouri.*

Before The National Labor Relations Board

Decision and Order of National Labor Relations Board

June 26, 1951

On January 18, 1951, Trial Examiner Stephen S. Bean issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (b) (1) (A) and 8 (b) (2) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Respondent's request for oral argument is hereby denied, as the record, the exceptions, and the Respondent's brief, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the

entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

We agree with the Trial Examiner that the Employer, by reducing Boston's seniority for being delinquent in the payment of his union dues, discriminated against Boston and that such discrimination would constitute a violation of Section 8 (a) (3) of the Act where, as in this case, the Respondent had not obtained a union-shop contract or a certification pursuant to Section 9 (e) of the Act.

We have recently considered a similar loss of seniority by an employee pursuant to a contractual seniority clause identical to the one here involved and we held that, unless protected, as it was there, by a valid union security agreement, such loss of seniority constituted discrimination within the meaning of Section 8 (a) (3).¹ Our dissenting colleague joined in this decision, but apparently regards it inapplicable here because the instant contract does not contain an operative union security clause. He argues that only members are subject to the Union's bylaws with respect to the payment of dues, that there is no evidence that the Union ever sought to compel nonmembers to pay dues, and that consequently Boston could have escaped reduction in seniority for failure to pay dues by resigning from the Union.

19 The vice in such argument is that it overlooks the fact that absent a valid contractual union-security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues without first obtaining proper authorization under Section 9 (e) of the Act. Thus, in *Sub Grade Engineering*, 93 N. L. R. B. No. 45, the Board held that where there was no security agreement in effect, a union's insistence upon the application of its trade rule requiring certain of its members to be given preference over other members during a layoff was permitting the union "to arrogate to itself the company's control of employment and to use such control to accomplish discharges which were clearly discriminatory."² In the *American Pipe Steel Corporation* case³ the Board pointed out that an employer may not lend his assistance to a union in compelling adherence to the latter's rules. For, in so doing an employer would be strengthening the position of such union contrary to the well-established principle that an employer's acceptance of the

¹ *Firestone Tire & Rubber Company*, 93 N. L. R. B. No. 161. The contract in this case contained a valid union security clause which the Board found to have protected the otherwise unlawful discrimination.

² See also *American Pipe and Steel Corporation*, 93 N. L. R. B. No. 11; *Air Products Inc.*, 91 N. L. R. B. No. 212; *Firestone Tire and Rubber Company*, supra.

³ See footnote 2, supra.

determination of a labor organization as to who shall be permitted to work for it is violative of Section 8 (a) (3) where no lawful contractual obligation for such action exists.

Moreover, to assume that Boston's seniority status would have remained unaffected had he resigned from the Union is to overlook the plain fact that the seniority clause in the contract applies to members and nonmembers alike, and is sufficiently broad to permit the Union to decide his seniority status regardless of his nonmembership in the Union. We are unwilling to make the naive assumption that it would not have reduced his seniority if he had resigned.⁴

20 We also agree that, in the circumstances of this case, the Respondent by engaging in the conduct described in the Intermediate Report, violated Section 8 (b) (1) (A) as well as Section 8 (b) (2) of the Act.⁵ The fact that the Employer may not actively have opposed Boston's reduction in seniority does not, in our view, exculpate the Respondent Union.⁶

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall, substantially in accordance with the Trial Examiner's recommendation, order the Respondent to cease and desist from its unlawful conduct and to take affirmative action necessary to effectuate the policies of the Act.

We shall further order the Respondent to make whole Frank Boston for any loss of pay he may have suffered as a result of the discrimination against him, in the manner provided for in the Intermediate Report.

We shall also order the Respondent to deduct from the amount due to Frank Boston such sums as would normally have been deducted from his wages by the Employer for deposit with State and Federal agencies on account of social security and other similar benefits and to pay to the appropriate State and Federal agencies, to the credit of Frank Boston and the Employer, a sum of money equal to the amount which, absent the discrimination, would have been deposited to his credit by the Employer, either as a tax upon the Employer or on account of deductions made from Boston's

⁴ Apparently to offset any contemplated resignations before the closed shop provision of the contract could be validly invoked after a 9 (e) election, the Employer contractually agreed "to recommend to all employees that they become members of the Union and maintain such membership during the life of this Agreement, to refer new employees to the union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of this contract" (Art. II, 4th par.).

⁵ Member Reynolds desires to note that he concurs in the Trial Examiner's failure to find, as alleged in the complaint, that the inclusion of the seniority clause in the contract was per se illegal only because no exceptions were filed to the Trial Examiner's failure to make such a finding. (See footnote 7 of the Firestone case, supra.)

⁶ See Sub Grade Engineering Company; American Pipe and Steel Corporation, supra.

wages by the Employer, on account of social security or other similar benefits.⁷

21 The Respondent shall not be liable for any back pay accruing subsequent to 5 days after the date on which the Respondent notifies the Employer and Boston, in accordance with our Order, that it withdraws its request that Frank Boston's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests said Employer to offer him full and immediate reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges.⁸

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Byers Transportation Company, Inc., its officers, agents, successors, and assigns to reduce the seniority of, or otherwise discriminate against, any of its employees because they are delinquent in their payment of dues to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., except in accordance with Section 8 (a) (3) of the Act;

(b) In any other manner causing or attempting to cause said Employer, its officers, agents, successors, and assigns, to discriminate against any of its employees in violation of Section 8 (a) (3) of the Act;

(c) Restraining or coercing employees of Byers Transportation Company, Inc., in the exercise of the rights guaranteed them in Section 7 of the Act.

22 2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Immediately notify, in writing, Frank Boston at his last known place of residence, and Byers Transportation Company, Inc., that it withdraws its request that Frank Boston's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests said Employer to offer him imme-

⁷ Pen and Pencil Workers Union, Local 19593, A. F. L. (Wilhelmina Becker), 91 N. L. R. B. No. 155.

⁸ Pinkerton's National Detective Agency, Inc., 90 N. L. R. B. No. 39.

diate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges;

(b) Make whole said Frank Boston for any losses of pay and other incidents of the employment relationship which he may have suffered because of the discrimination against him in the manner described in that section of the Board's decision entitled "The Remedy";

(c) Post in conspicuous places in its business offices, and wherever else notices to its members are customarily posted, copies of the notice attached hereto as Appendix A.⁹ Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Seventeenth Region signed copies of the notice attached hereto as Appendix A for posting, the Employer willing, at the office and place of business of the Employer in Kansas City, Missouri, in places where notices to employees are customarily posted. Copies of said notice to be furnished by said Regional Director, shall, after being signed as provided in paragraph 2 (c) of this Order, be forthwith returned to the Regional Director for such posting; and

23 (e) Notify the Regional Director for the Seventeenth Region, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

Signed at Washington, D. C., June 26, 1951.

[SEAL]

PAUL M. HERZOG, *Chairman,*
JOHN M. HOUSTON, *Member,*
JAMES J. REYNOLDS, JR., *Member,*
National Labor Relations Board.

Abe Murdock, Member, dissenting:

I cannot agree with my colleagues that the Respondent Union in this case has violated either Section 8 (b) (1) (A) or Section 8 (b) (2) of the Act.

In its decision the majority has stated that "* * * the Employer, by reducing Boston's seniority for being delinquent in the

⁹In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice before the words, "A Decision And Order," the words, "A Decree Of The United States Court Of Appeals Enforcing."

payment of his Union dues, discriminated against Boston and that such discrimination would constitute a violation of Section 8 (a) (3) of the Act * * *” In my opinion, this conclusion is not warranted by the facts of this case. The Employer, following its customary procedure under the terms of its collective bargaining agreement with the Respondent, submitted the seniority list to the Respondent Union for settlement of any controversy over seniority standing. The Respondent Union, finding that one of its members had been delinquent, applied, in a nondiscriminatory manner, the provision of its bylaws by which its membership had agreed to forfeit seniority for failure to pay dues promptly. The Employer, bound by its agreement with the representative of its employees, the Respondent, acquiesced in this application of the Respondent’s rules to one of its members, and posted a seniority list reflecting Boston’s reduction in seniority.

On these facts I fail to perceive any restraint, coercion or discrimination within the meaning of the sections of the Act which the majority finds have been violated. In what respect was Boston or any other employee of the Employer restrained, coerced,

or discriminated against? The theory of the majority per-
24 force must be that the Employer’s action to effectuate the

Union’s bylaw constitutes discrimination violative of Section 8 (a) (3) because calculated to “encourage” membership in and adherence to the rules of the Union. Common sense, however, tells us that the employer’s action would not encourage membership in the Union.¹⁰ As there is no union-security clause compelling membership in the Union, it would be quite apparent to Boston that if he resigned from the Union he could suffer no detriment in his employment but on the contrary would be better off because he would no longer be subject to the Union’s bylaws and subject to reduction in seniority if he fell behind in his dues payments. Contrary to the statement in the majority opinion, I do not overlook the fact that the seniority clause in the contract applies not only to union members but to all employees. But the majority’s conclusion from that fact that Boston could have escaped the reduction in seniority he suffered because of his delinquency by resigning from the union is a non sequitur. The theory apparently is that the seniority clause is somehow discriminatory and would permit the union to apply its bylaw and ask a reduction in seniority for nonmember employees who did not pay dues. But it is clear that the Union’s bylaw is applicable only to members and there is not even a suggestion in the case that the Union has sought to compel nonmembers to pay union dues or to penalize them for not paying. Moreover, the Board’s de-

¹⁰ Cf. *American Pipe and Steel Corporation*, 93 N. L. R. B. No. 11.

cision in Firestone Tire and Rubber Company¹¹ precludes finding a seniority clause such as this which is nondiscriminatory on its face, to be illegal even though the union is given the authority to settle controversies over seniority. The Board pointed out that "The seniority provision, although permitting the Union to control seniority to some extent, does not on its face provide that the Union should do so because of union affiliation." The Board there specifically refused to proceed on the assumption that a union would utilize a seniority clause which did not on its face provide for discrimination. It was precisely for that reason that the Board refused to find such a seniority clause illegal in the Firestone case. Even though the majority now inconsistently

25 argue that it is "naive" to assume that a union will act lawfully rather than unlawfully applying such a seniority clause, I nevertheless continue to stand by that proposition.

I disagree with the majority's suggestion that another part of the Firestone decision, the Sub Grade Engineering decision, or the American Pipe and Steel decision, are dispositive of the instant case. Apart from the holding that such a seniority clause is not illegal per se, the only other holding in the Firestone case was that a similar loss of seniority under such a clause did not constitute discrimination in the context of a valid union-security agreement.¹² The Sub Grade Engineering case is not dispositive because there the element of encouragement of membership in a union which is lacking here was present. The termination of two employees in that case because they were not members of Local 101 was discrimination which clearly encouraged membership in Local 101. I recognize, of course, that in American Pipe and Steel Corporation, in which I partially dissented, the majority held that discrimination to encourage membership in a union can take place in the case of one already a member of the union, and I am bound by that decision. However, I do not regard that case as controlling on these facts. There, because the employer was willing to condition hire on referral from the union (which referred only on a rotation basis), the employee member who was terminated because he had not been referred by the Union in the regular manner, could be said to have been encouraged by the employer to maintain membership in and adhere to the rules of the Union as the only means of getting employment. But in the instant case, as pointed out, Boston could retain his employment and suffer no detriment even if he severed his membership in the Union.

¹¹ 93 N. L. R. B. No. 161.

¹² Although I find that there was dicta in the decision that the reduction in seniority would have constituted discrimination if there had been no valid union-security clause, this was not necessary to the disposition of the case, and I dissociate myself from that dicta.

Accordingly, because I do not believe it can be found that the reduction of Boston's seniority encouraged membership in the Union, I find no basis for a conclusion that the Respondent Union in violation of Section 8 (b) (2) caused the employer to discriminate against Boston "to encourage" membership in the Union.

26 I likewise do not believe it can be found that the Respondent Union restrained or coerced Boston in violation of Section 8 (b) (1) (A) by applying its rules to reduce his seniority. As has been pointed out, Boston was entirely free to withdraw from membership in the Union without suffering any detriment in his employment. He chose, however, to remain in the Union, subject to the Union's rules. The Respondent required only that, as a member of the Union, Boston or any other member be subject to the organization's governing bylaws; one of these was his forfeiture of seniority rights upon failure to pay his dues within a specified time. To hold that this conduct constituted a violation of Section 8 (b) (1) (A) is, in my opinion, to overlook the significance of the fact that Boston freely elected to be a member of the Union and bound by its rules. It seems to me that to find a violation of the Act in the circumstances of this case is to engage in an unwarranted invasion of the internal affairs of a labor organization—an invasion which I do not believe is sanctioned, much less required, by the Act. The bylaws of the Union, adopted by a majority of the membership, govern the conduct and union relationship of all the members of the organization. Dissidents have it within their power to change the operating rules of the organization; but in my opinion such power should be derived from the dissenters' ability to persuade a majority of their fellow members to the validity of their opposing viewpoint and thus to amend the regulations controlling the functioning of the organization. Such change should not be achieved in the manner approved by the majority in the present case.

For the foregoing reasons, I would find that the Respondent has not violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act and would accordingly dismiss the complaint in this case.

Signed at Washington, D. C., June 26, 1951.

ABE MURDOCK,
Member.

Appendix A

NOTICE

To All Members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L.,

27

*and to All Employees of Byers Transportation Company, Inc.,
Kansas City, Missouri.*

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause Byers Transportation Company, Inc., its officers, agents, successors, or assigns, to reduce the seniority of, or otherwise discriminate against, any of its employees, because they are delinquent in the payment of dues to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., except in accordance with Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees of Byers Transportation Company, Inc., its successors or assigns, in the exercise of their right to engage in, or to refrain from engaging in, any or all concerted activities guaranteed in Section 7 of the National Labor Relations Act.

We Will immediately notify Frank Boston, and Byers Transportation Company, Inc., that we have no objection to the immediate reinstatement of Frank Boston to his former or to a substantially equivalent position and standing on the seniority list of and as an employee of Byers Transportation Company, Inc.

We Will make whole Frank Boston for any loss of pay and other incidents of the employment relationship suffered because of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA, OVER-THE-ROAD AND CITY
TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION NO. 41,
A. F. L.

(Labor Organization.)

By _____,

(Representative) (Title).

Dated _____

28

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before National Labor Relations Board

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

[Title omitted.]

William J. Scott, Esq., for the General Counsel.

John J. Manning, Esq., of Kansas City, Mo., for the Respondent.

Frank Boston, pro se, for the Charging Party.

Intermediate report and recommended order

January 18, 1951

Upon a charge filed August 7, 1950, by Frank Boston, hereinafter referred to as Boston, or the Charging Party, the General Counsel of the National Labor Relations Board, hereinafter called the General Counsel and the Board, respectively, by the Regional Director for the Seventeenth Region (Kansas City, Missouri), issued a complaint dated September 8, 1950, against International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., hereinafter referred to as the Union or the Respondent. The

29 complaint alleged that Respondent had engaged in and was then engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the National Labor Relations Act, 61 Stat. 136, as amended, herein called the Act. Copies of the complaint, the charge, and notice of hearing were duly served on Respondent.

With respect to the unfair labor practices, the complaint alleged in substance, that by certain acts, no election, as provided in Section 8 (a) (3) and Section 9 (e) (1) of the Act, having been held for the unit to which the Charging Party belongs, Respondent Union caused or attempted to cause the Charging Party's Employer to reduce the Charging Party's seniority because he failed to pay dues on time in accordance with the Union's bylaws, thus attempting to cause and causing the Employer to discriminate against the Charging Party, and thereby restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and consequently engaging in unfair labor practices in violation of the sections of the Act set forth in the paragraph above.

Respondent generally denied the allegations of the complaint, pleaded in substance that the complaint did not state facts sufficient to give the Board jurisdiction of Respondent or the subject matter of the proceeding, that by virtue of the Respondent's right

to prescribe its own rules with respect to the acquisition or retention of its membership and since a member of a labor organization is not protected from bylaws passed by the membership, the Board is without jurisdiction and that the conduct and statements complained of were lawful and protected by Section 8 (c) of the Act.

Pursuant to notice, a hearing was held on November 21, 1950, at Kansas City, Missouri, before Stephen S. Bean, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the

opening of the hearing the General Counsel moved to
30 amend paragraph IX of the complaint by substituting
"June" for "August." This motion was allowed. Respondent moved to dismiss the complaint on the ground of an asserted variance between the charge and the complaint. This motion was denied. At the conclusion of the General Counsel's case and again at the conclusion of the entire case, Respondent moved to dismiss the complaint on the grounds that the Charging Party desires to withdraw the charge, a desire denied him by the Regional Director and that the complaint assuming the truth of all its allegations, fails to show facts constituting unfair labor practices within the purview of Section 8 (1) (A) and 8 (b) (2) of the Act. I took both motions under advisement and hereby deny them. At the close of the hearing General Counsel and Respondent argued the case. Respondent filed a brief which has been considered.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of fact

1. THE BUSINESS OF THE EMPLOYER

Byers Transportation Company, Inc., hereinafter called the Employer, is a Missouri corporation. It is engaged as a common carrier in motor transportation of commodities between St. Louis, Missouri, and Kansas City, Missouri, and between St. Joseph, Missouri, and Kansas City, Missouri. It operates subsidiary lines from St. Joseph, Missouri, to Leavenworth, Kansas, and Atchison, Kansas. It also occasionally makes full trailer deliveries from points on its regular runs to Wichita, Kansas. It has extensive interline agreements by which commodities are shipped beyond its own routes by other common carriers. A substantial

portion of the commodities handled by the Employer terminate or originate outside the State of Missouri. Its operations are subject to regulation by the Interstate Commerce Commission. Its annual gross revenue is in excess of \$1,000,000.

I find that the Employer is engaged in commerce, and that, under applicable decisions of the Board, jurisdiction should be asserted in this proceedings.

II. THE CHARGING PARTY AND THE ORGANIZATION INVOLVED

31 It is admitted and I find that the Charging Party is an employee of the Employer and a member of Respondent, and that Respondent is a labor organization admitting to membership employees of the Employer and is the bargaining representative for employees of the Employer.

III. THE UNFAIR LABOR PRACTICES

Facts

The Employer and Respondent had entered into an agreement in force at the time all events with which this case is concerned, occurred. This agreement provides, inter alia, that seniority shall prevail and be broken only by discharge, voluntary quit, or more than a 2-year lay-off, in which latter event a 2-week notice of recall shall be given, subsequent to the expiration of which time an employee not making himself available for work shall lose all seniority rights; it further provides that a list of employees in order of seniority shall be posted at their place of employment and that controversies over seniority standing, of any employee on the list shall be referred to the Union for settlement.

No union-shop contract existed between the Employer and Respondent.

The Charging Party failed to pay his June 1950 union dues to Respondent until July 5, 1950. One of Respondent's bylaws provides that any member failing to pay dues by the second day of the second month for which payable becomes in arrears, and shall forfeit all seniority rights. Respondent, the General Counsel, and the Charging Party, all construed this bylaw to mean that the failure of the Charging Party to pay his June dues on or before July 2, caused the Charging Party to lose his seniority rights. Thereafter on or about July 15, 1950, Respondent requested the Employer to reduce the Charging Party's seniority, by posting a new list supplied by Respondent. The Employer complied with Respondent's request with the result that the Charging Party's seniority was reduced from the 18th to the 54th position.

As a consequence of this conduct, the Charging Party has lost assignments for two trips for which he otherwise would have potentially received pay in the amount of \$28.05 for each trip.

32

Discussion and conclusions

Here we have a case where a union has caused a nonunion shop employer to penalize one of a union's own members for his failure to comply with union bylaws.

Respondent asserts its conduct is not violative of the Act for the reasons contained in its motion to dismiss.

The contention that the complaint should be dismissed because the Charging Party does not desire to have it prosecuted is without merit. *Wine, etc. Workers Union et al.*, 78 N. L. R. B. 504.

It is fundamental that once a charge is filed the General Counsel proceeds not in vindication of private rights but as an agency charged by Congress with the function of enforcing the Act and bringing about compliance with its provisions.

The contention that the complaint should be dismissed because of the limiting proviso to Section 8 (b) (1) (A) that the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, is also without merit. We are not dealing in this case with the acquisition or retention or membership. Boston had acquired membership before, and continued to retain membership after, his seniority was reduced.

The proviso is ambiguous. It concerns only the internal regulations of labor organizations. It has no reference to conduct of the character involved in this case, where the Union enforced its rules with respect to the timely payment of dues by causing the Employer to penalize a member in default. The proviso furnishes no warrant for a union externally to cause an employer to discriminate against an employee in regard to a condition of employment in order to encourage membership or the retention of membership in a union nor does it permit a union to enforce its rules by causing an employer to penalize or discriminate against members who violate its rules. In other words, the proviso does not reserve to a union the right to compel obedience by causing an employer to discipline an offending member, as the Respondent Union did in this case, or otherwise to reopen the road to discrimination closed by Section 8 (a) (3).

33 Clearly the Employer discriminated against Boston when it reduced his seniority.

The Respondent arrogated to itself the Employer's control over employment, and to use such control to accomplish a clearly discriminatory reduction of Boston's seniority. It find that by its

conduct Respondent caused the Employer to discriminate against the Charging Party in violation of Section 8 (a) (3) which proscribes unequal treatment of employees in regard to any condition of employment to encourage or discourage membership in any labor organization.

When the Respondent executed the contract with the Employer it intended that the entire agreement, including the provision with respect to seniority, would be enforced to the end that employees failing to comply with the bylaw relating to the payment of dues would be penalized pursuant to its terms. Such enforcement of the contract constitutes discrimination in violation of Section 8 (a) (3). Consequently by participating on or about July 15, 1950, in the enforcement of the contract Respondent played a part in creating a condition which resulted in the subsequent discrimination.

Section 8 (b) (2) of the Act, which the Respondent is alleged to have violated, provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3)." It has been found that Respondent caused the Employer to discriminate against the Charging Party in violation of the latter section. Accordingly, I find that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act. *H. M. Newman*, 85 N. L. R. B. 725. I find also that Respondent has restrained and coerced and is restraining and coercing employees in violation of Section 8 (b) (1) (A) thereof. *Clara-Val Packing Company*, 87 N. L. R. B. No. 120. My conclusion that Respondent violated the latter section does not automatically flow from my finding that it violated Section 8 (b) (2). It is predicated mainly on the fact that the specific act of the Union involving an economic reprisal against its member was itself violative of Section 8 (b) (1) (A).

The Board has held that a violation of Section 8 (b) (1) 34 (A) does not invariably stem from a union's violation of Section 8 (b) (2). But when as here, Respondent's objective was directed at compelling employees to forego their rights including the right to refrain from assisting a labor organization, which Section 7 protects, I have concluded that by causing the Employer discriminatorily to reduce Boston's seniority, the Union restrained Boston in the exercise of his rights guaranteed under Section 7 and thereby violated Section 8 (b) (1) (A).

The normal effect of the discrimination against Boston was to encourage nonmembers to join the Union, as well as members to retain their good standing in the Union, a potent organization whose assistance is to be sought and whose opposition is to be avoided. The Employer's conduct tended to encourage member-

ship in the Union.¹³ Its discrimination against Boston had the further effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in. In deciding this case, I have been influenced by the rationale of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C. I. O., Local 291, (Vernon J. Luebke), 92 N. L. R. B. No. 156 and cases therein discussed, rather than by the exposition of principles contained in Respondent's brief.

Section 9 (c) of the Act, asserting as it does, that the expression of views, argument, or opinion containing no threat of reprisal or force or promise of benefit shall not constitute or be evidence of an unfair labor practice, invoked as a defense in Respondent's answer, was not relied upon in the trial of the case, and has no applicability to its facts.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in Section III, above, occurring in connection with the operations of the
35 Employer described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

1. The Respondent notify the Charging Party and the Employer, in writing, that it withdraws its request that the Charging Party's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests the Employer to offer the Charging Party, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges.

¹³ If, as Respondent appears to suggest, its conduct discouraged membership in a labor organization, it could be argued that from the plain meaning of Section 8 (a) (3), a union would equally violate the Act by causing an employer to discriminate against an employee in order to rid itself of slow-paying or otherwise recalcitrant members.

2. The Respondent make whole the Charging Party for any losses of pay and other incidents of the employment relationship which he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from the date of the discrimination to 5 days after the date on which the Union serves upon the Respondent the above-described written request. The losses of pay, if any, shall be computed upon a quarterly basis in the manner recently established by the Board.¹⁴

Upon the basis of the above findings of facts and upon the entire record in the case, I make the following:

Conclusions of law

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. By causing, and attempting to cause, the Employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

36 3. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, I hereby recommend that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Causing, or attempting to cause, Byers Transportation Company, Inc., its agents, successors, or assigns to reduce the seniority of, or otherwise discriminate against employees in violation of Section 8 (a) (3) of the Act; and

(b) In any other manner restraining or coercing employees of Byers Transportation Company, Inc., its successors or assigns, in the exercise of their rights to engage in, or to refrain from en-

¹⁴ F. W. Woolworth Company, 90 N. L. R. B. No. 41.

gaging in, any or all of the concerted activities guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Immediately notify, in writing, Frank Boston at his last known place of residence, and Byers Transportation Company, Inc., that it withdraws its request that Frank Boston's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests said employer to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudices to seniority or other rights and privileges;

(b) Make whole said Frank Boston for any losses of pay and other incidents of the employment relationship which he may have suffered because of the discrimination against him in the manner described in "The Remedy";

(c) Post in conspicuous places in its business offices, and wherever else notices to its members are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Mail to said Regional Director signed copies of the notice attached hereto as Appendix A, for posting, the Employer willing, at the office and place of business of the Employer in Kansas City, Missouri, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by said Regional Director, shall, after being duly signed by the Respondent, be forthwith returned to the Regional Director for such posting; and

(e) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, a report in writing, setting forth in detail the steps which the Respondent has taken to comply herewith.

It is further recommended that unless Respondent within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notifies said Regional [fol. 60] Director in writing that it will comply with the foregoing Recommendations, the National Labor Relations Board issue an order requiring it to take the action aforesaid.

Dated at Washington, D. C., this 18 day of January, 1951.

STEPHEN S. BEAN,
Trial Examiner.

Appendix A

NOTICE

To All Members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., and to All Employees of Byers Transportation Company, Inc., Kansas City, Missouri:

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not cause, or attempt to cause, Byers Transportation Company, Inc., its agents, successors, or assigns, to reduce the seniority of employees or otherwise discriminate against employees in violation of Section 8 (a) (3) of the National Labor Relations Act.

We Will Not in any other manner restrain or coerce employees of Byers Transportation Company, Inc., its successors or assigns, in the exercise of their right to engage in, or to refrain from engaging in, any or all concerted activities guaranteed in Section 7 of the National Labor Relations Act.

We Will immediately notify Frank Boston, and Byers Transportation Company, Inc., that we have no objection to the immediate reinstatement of Frank Boston to his former or substantially equivalent position and standing on the seniority list of and as an employee of Byers Transportation Company, Inc.

39 We Will make whole Frank Boston for any loss of pay and other incidents of the employment relationship suffered because of the discrimination against him.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, OVER-THE-ROAD AND CITY
TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION NO. 41,
A. F. L.

(Labor Organization.)

By _____,
(Representative) (Title).

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In United States Court of Appeals

Petition for enforcement of an order of the National Labor Relations Board

Filed in U. S. Court of Appeals September 20, 1951

No. 14457

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION NO. 41, A. F. L., RESPONDENT

To the Honorable, the Judges of the United States Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 40 Supp. IV Secs. 151, et seq.), herinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L., its officers, representatives, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. L. and Frank Boston, an Individual, Case No. 17-CB-36."

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in protecting and promoting the interest of its members in the State of Missouri, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on June 26, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, representatives, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41 A. F. L., its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Byers Transportation Company, Inc., its officers, agents, successors, and assigns to reduce the seniority of, or otherwise discriminate against, any of its employees because they are delinquent in their payment of dues to International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41 A. F. L., except in accordance with Section 8 (a) (3) of the Act;

(b) In any other manner causing or attempting to cause said Employer, its officers, agents, successors, and assigns, to discriminate against any of its employees in violation of Section 8 (a) (3) of the Act;

(c) Restraining or coercing employees of Byers Transportation Company, Inc., in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Immediately notify, in writing, Frank Boston at his last known place of residence, and Byers Transportation Inc., that it withdraws its request that Frank Boston's seniority be reduced from the position in which it stood on or about July 15, 1950, and that it requests said Employer to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges:

(b) Make whole said Frank Boston for any losses of pay and other incidents of the employment relationship which he may have suffered because of the discrimination against him in the manner described in that section of the Board's decision entitled "The Remedy";

(c) Post in conspicuous places in its business offices, and wherever else notices to its members are customarily posted, copies of the notice attached hereto as Appendix A.¹⁵ Copies of said notice,

¹⁵ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an official representative of the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Seventeenth Region signed copies of the notice attached hereto as Appendix A for posting, the Employer willing, at the office and place of business of the Employer in Kansas City, Missouri, in places where notices to employees are customarily posted. Copies of said notice to be furnished by said Regional Director, shall, after being signed as provided in paragraph 2 (c) of this Order, be forthwith returned to the Regional Director for such posting; and

(e) Notify the Regional Director for the Seventeenth Region, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

(3) On June 26, 1951 the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, representatives, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
By A. NORMAN SOMERS,

Assistant General Counsel.

Dated at Washington, D. C., this 13th day of September 1951.

Appendix A

FORM OF NOTICE POSTED, ETC. OMITTED. PRINTED SIDE PAGE 26
ANTE

In United States Court of Appeals

Answer to petition for enforcement

Filed in U. S. Court of Appeals on September 24, 1951

[Title omitted.]

To the Honorable, the Judges of the United States Court of Appeals for the Eighth Circuit:

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen,
45 Local Union No. 41, A. F. L., Respondent herein, for answer to the petition of the National Labor Relations Board for enforcement of its order:

1. Admits the allegations of paragraph 1 of said petition.
2. Admits that the Board made the order referred to in paragraph 2 of said petition.
3. Admits the allegations of paragraph 3 of said petition.
4. Denies that respondent:
 - a. Has caused or attempted to cause Byers Transportation Company, Inc., to reduce the seniority of or otherwise discriminate against any of its employees because were delinquent in their payment of dues to Respondent.
 - b. In any other manner caused or attempted to cause said employer to discriminate against any of its employees in violation of Section 8 (a) (3) of the National Labor Relations Act.
 - c. Restrained or coerced employees of Byers Transportation Company, Inc., in the exercise of the rights guaranteed them in Section 7 of the Act.

Wherefore, having fully answered, Respondent prays that the petition for enforcement be denied.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA, OVER-THE-ROAD AND CITY
TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41,
A. F. L.

By CLIF. LANGSDALE,

By JOHN J. MANNING,

*Attorneys for Respondent, 922 Scarritt Building, Kansas
City, Missouri, Victor 9880.*

In United States Court of Appeals

Portions of Record printed as an appendix to brief of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers and Dockmen and Warehousemen, Local Union No. 41, A. F. L.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEVENTEENTH REGION

[Title omitted.]

ROOM 304, FIDELITY BUILDING,
911 WALNUT STREET, KANSAS CITY, MISSOURI,
Tuesday, November 21, 1950.

Transcript of hearing

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a. m.

Before: STEPHEN S. BEAN, Esq., Trial Examiner.

Appearances

William J. Scott, Esq., 1411 Fidelity Building, Kansas City, Missouri, Counsel for General Counsel.

John J. Manning, Esq., 922 Scarritt Building, Kansas City, Missouri, Appearing on Behalf of the Respondent.

Mr. SCOTT. Now, in our off-the-record discussion, it is my understanding that Mr. Manning, counsel for Local 41, admits the allegations in the first eight paragraphs of the complaint.

Trial Examiner BEAN. Is that correct?

Mr. MANNING. That is correct; yes, sir.

PAUL HOWARD BYERS, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. SCOTT:

Q. State your full name, Mr. Byers.—A. Paul Howard Byers.

Q. Where do you live, Mr. Byers?—A. 4419 Roanoke Parkway.

Q. What is your business, Mr. Byers?—A. I am associated with my father in business, truck transportation.

Q. And what company?—A. Byers Transportation Company, Incorporated.

Q. Are you acquainted with Mr. Frank Boston, the charging party in this case?—A. He is an employee of our company.

Q. And how long has he been an employee of your company?—
A. I don't know the exact time, I don't know. For a period of years.

Q. Would it be as many as four years in your opinion?—A. I don't know exactly how long he has.

Q. The counsel for Local 41 has admitted that Local 41 at all times material hereto has been the bargaining representative for your employees. Have you had a written agreement with the Local 41?—A. Yes, sir.

(Thereupon a document was marked as "General Counsel's Exhibit No. 2" for identification.)

54 Q. I hand you what has been identified as General Counsel's Exhibit 2 and ask you what that is?—A. That is the agreement that we have with Local 41.

Q. And how long has that agreement been in effect at your plant?—A. Since its inception. Since the time it's covered by the contract here on the front.

Q. Which is from November 16, 1949?—A. To the present time, to and including January 31, 1952.

Q. And is that contract, does it cover the working conditions, hours of employment and so forth with Mr. Frank Boston?—A. Yes.

Mr. SCOTT. We ask that General Counsel's Exhibit No. 2 be admitted.

Mr. MANNING. No objection.

Trial Examiner BEAN. It will be admitted.

(The document heretofore marked "General Counsel's Exhibit No. 2," for identification, was received in evidence.)

By Mr. SCOTT:

Q. Now, do you recall that on or about July 5 of this year any conversation with any representative of the union as to Mr. Boston's seniority?—A. No; there was no conversation.

Q. Well, what took place regarding his seniority in July of this year?—A. Well, we submit a list of our employees to the union with their anniversary date of their employment and in turn the union supplies us with a seniority list.

Q. Well, who fixes the seniority of your employees?—A. The union.

Q. And on what basis? How is it fixed?—A. On the basis of our agreement. I assume it is from the anniversary date of the employees plus the agreements in this contract that govern the employee.

Q. They tell you whether such and such an employee is No. 1 or No. 2?—A. Yes.

General Counsel's Exhibit 2

55 Central States Area Over-the-Road Motor Freight Agreement covering drivers employed by private, common and contract carriers for the period of November 16, 1949, to January 31, 1952, in the following territory: Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas, and operations into and out of all contiguous territory.

The _____ hereinafter referred to as the
(Company)
Employer, and the Central States Drivers Council and Local
Union No. _____, affiliated with the International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
A. F. of L., hereinafter referred to as the Union, agree to be bound
by the terms and provisions of this Agreement.

Hourly and mileage rates appearing in this agreement in bold-face type are effective for the period from November 16, 1949, to and including January 31, 1951.

Hourly and mileage rates appearing in italics enclosed in brackets are effective for the period from February 1, 1951, to and including January 31, 1952.

56 ARTICLE I. SCOPE OF AGREEMENT

SECTION 1. OPERATIONS COVERED

The execution of this Agreement on the part of the Employer shall cover all over-the-road operations of the Employer within, into, and out of the Area and Territory described above.

SECTION 2. EMPLOYEES COVERED

(a) Employees covered by this Agreement shall be construed to mean any driver, chauffeur, or driver-helper operating a truck, tractor, motorcycle, passenger or horse-drawn vehicle, or any other vehicle operated on the highway, street or private road for transportation purposes when used to defeat the purposes of this Agreement.

STUDENT DRIVER

(b) Employees on student trips shall be paid in accordance with the provisions of this Agreement.

SECTION 3. CITY OR LOCAL WORK

Local dock work or city pickup and delivery service is not subject to the terms and conditions of this Agreement, but is subject

to separate agreements entered into between the Employer and the involved Local Union. Employees subject to this Agreement shall not be permitted to perform dock work or city pickup and delivery service, except as specifically permitted herein.

The prevailing Local Union city cartage contract shall govern all wages and conditions on runs exclusively within a radius of twenty-five (25) miles of the home terminal, provided the hourly wage rates are equal to or higher than the peddle rate in this contract; otherwise the peddle rate shall apply.

57 SECTION 4. TRANSFER OF COMPANY TITLE OR INTEREST

This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. On the sale, transfer or lease of an individual run or runs, only the specific provisions of this contract, excluding supplements or other conditions, shall prevail. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this contract.

SECTION 5. RIDERS

Riders or supplements to this Agreement providing for better wages, hours and working conditions, which have previously been negotiated by Local Unions and Employers affected and put into effect, shall be continued. No new riders or supplements to this Agreement shall be negotiated by any of the parties hereto.

ARTICLE II. UNION SHOP AND DUES

SECTION 1

(a) The Union shall be the sole representative of those classifications of employees covered by this Agreement in collective bargaining with the Employer. The Employer agrees that any and all employees within the classification of work as herein provided shall be members of the Union in good standing as a condition of continued employment. When the Employer needs additional men, he shall give the Union equal opportunity with all other

sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Union.

If a nonmember is hired, he shall work under the provisions of this Agreement, shall make application for membership in the Union, and become a member no later than the thirty-first

(31st) day of his employment, and shall thereafter maintain membership in good standing in the Union as a condition of continued employment.

The above paragraph shall not apply to any Union, party to this Agreement, until such time as it is properly certified by the National Labor Relations Board as being authorized to enter into such Agreement, nor shall it apply in any state where prohibited by state law.

If the first paragraph hereof is invalid under the law of any state wherein this contract is executed, it shall be modified to comply with the requirements of state law or shall be renegotiated for the purposes of adequate replacement.

In those instances where the first paragraph of this clause may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Union and maintain such membership during the life of this Agreement, to refer new employees to the Union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of this contract.

59 All of the provisions of this section shall be automatically amended to embody the greater Union security provisions contained in the 1947-1949 Central States Area Over-the-Road Motor Freight Agreement or to extend to situations not now permitted, to the extent that such amendments or extensions become permissible under applicable State and Federal Law during the life of this Agreement as a result of legislative, administrative or judicial determination.

Nothing contained in this section shall be construed so as to require the Employer to violate any applicable law.

(b) A new employee shall be employed only on a thirty-day trial basis, during which period he may be discharged without further recourse, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty days the employee shall be placed on the regular seniority list.

(c) In case of discipline within the thirty-day period, the Employer shall notify the Union in writing.

SECTION 2

The Employer agrees to deduct from the pay of all employees covered by this Agreement dues, initiation fees and/or assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions. Where laws require written authorization by the employee, the same is to be furnished in the form required.

ARTICLE III. STEWARDS

The Employer recognizes the right of the Union to designate a job steward and alternate to handle such Union business as may from time to time be delegated to them by the Union. Job stewards and alternates have no authority to take strike action or any other action interrupting the Employer's business in violation of this Agreement, except as authorized by official action of the Union. The Employer recognizes this limitation upon the authority of job stewards and their alternates. The Employer, in so recognizing such limitation, shall have the authority to render proper discipline, including discharge without recourse, to such job steward or his alternate, if he be an employee, in the event the job steward or his alternate has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement. Job steward, where possible, shall be an employee of the Employer. It is recognized that in certain cases it will not be practicable or feasible for the job steward to be such an employee, but the parties hereto shall cooperate to effectuate the intent of this Article.

ARTICLE IV. ABSENCE

SECTION 1. TIME OFF FOR UNION ACTIVITIES

The Employer agrees to grant the necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to any employee designated by the Union to attend a labor convention or serve in any capacity on other official Union business, provided 48 hours' written notice is given to the Employer by the Union, specifying length of time off. The Union
61 agrees that, in making its request for time off for Union activities, due consideration shall be given to the number of men affected in order that there shall be no disruption of the Employer's operations due to lack of available employees.

SECTION 2. LEAVE OF ABSENCE

Any employee desiring leave of absence from his employment shall secure written permission from both the Union and the Employer. Failure to comply with this provision shall result in the complete loss of seniority rights of the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights.

ARTICLE V. SENIORITY

SECTION 1

Seniority rights for employees shall prevail. Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off. In the event of a lay-off, an employee so laid off shall be given two weeks' notice of recall mailed to his last known address. In the event the employee fails to make himself available for work at the end of said two weeks, he shall lose all seniority rights under this Agreement. A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement.

SECTION 2

The Employer shall not require, as a condition of continued employment, that an employee purchase truck, tractor and/or tractor and trailer or other vehicular equipment.

62

SECTION 3

(a) All runs and new positions are subject to seniority and shall be posted for bids. Posting shall be at a conspicuous place so that all eligible employees will receive notice of the vacancy, run or position open for bid, and such posting of bids shall be made not more than once each calendar year, unless mutually agreed upon. Peddle runs shall not be subject to bidding. Past practices shall prevail in bidding on peddle runs.

(b) When it becomes necessary to reduce the working force, the last man hired shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they are laid off.

SECTION 4

(a) In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by the Union or Unions having jurisdiction over said employees.

(b) If the minimum wage, hour and working conditions in the company absorbed differ from those minimums set forth in this Agreement, the higher of the two shall remain in effect for the men so absorbed.

ARTICLE VI. MAINTENANCE OF STANDARDS

SECTION 1. PROTECTION OF CONDITIONS

The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be im-

* * * * *

63 desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

63

SECTION 2

It is further provided that where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revision in this Agreement, either party may serve upon the other a notice, at least sixty (60) days prior to January 31, 1952, or January 31st of any subsequent contract year, advising that such party desires to continue this Agreement but also desires to revise or change terms or conditions of such Agreement.

SECTION 3

Revisions agreed upon or ordered shall be effective as of February 1, 1952, or February 1st of any subsequent contract year. The respective parties shall be permitted all legal or economic recourse to support their request for revisions if the parties fail to agree thereon.

64 In witness whereof the parties hereto have set their hands and seals this 12th day of November 1949, effective as of November 16, 1949.

NEGOTIATING COMMITTEES

For the employees: Central States Drivers Council: James R. Hoffa (Chairman), Harry W. Card, Walter E. Biggs, E. J. Williams, John O'Brien, E. E. Hughes, J. F. Scislowski, Sidney L. Brennan, J. D. White, Floyd R. Hayes, Peter Capellupo, Michael J. Healy (Chairman of Council), Arthur F. Hudson (Executive Secretary), David Previant (General Counsel).

For the employees: Central States Area Employees Association: Earl N. Cannon (Chairman), Glenn W. Stephens (Counsel), C. L. Jones, H. C. Sanford, E. W. Krause, R. L. Cheek, John C. Brennan, Warren Taussig, K. H. Grant, C. J. Buhner, E. W.

Murphy, Alex Scherer, W. J. Creagan, A. A. Zebrowski, Walter Mullady.

Michigan Trucking Labor Division: Frank Blunden (Chairman), L. D. Rahilly, A. Robertson, J. H. Minnick, A. C. Scott, Don Smith, Jack Craig, Ed Hess, C. D. Matheson (General Counsel), A. D. Matheson (Secretary).

Midwest Operators Association: R. J. Babcock, M. M. Krupinsky, J. J. Brady, W. J. McCarthy (General Manager).

Missouri-Kansas Motor Carriers Conference: F. G. Campbell (Chairman), Ezra Knaus, W. Orscheln, C. J. Morse (Secretary).

Steel Truckers Employers Association: George Maxwell (Secretary).

The Santa Fe Trail Transportation Company: C. F. Offenstein (Ass't to Vice President), W. A. Gammon (Ass't Vice President).

TransAmerican Freight Lines, Inc.: R. B. Gotfredson, President.

Keeshin-Hayes Freight Lines, Inc.: J. L. Keeshin (Chairman of Board).

65 Ohio Over-the-Road Employers: L. P. O'Brien (Chairman), R. F. Todd (Secretary), C. J. Madigan, R. L. Thompson, D. H. Gilhousen, C. Baldwin, R. Riley, G. L. Smith, H. O. Saunders, C. Kelly, T. Cronin, B. Dickinson, O. M. Lattavo, J. W. Sentle, George Devaul.

66 Local Union No.-----, affiliate of I. B. of T., C., W., & H., of A., A. F. L.

By-----

(Company)

By-----

Its-----

(Title)

Home office address:

(Street)

(City)

(State)

This contract is approved as to form only by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in doing so the International Union assumes no liability whatsoever under this contract for the performance thereof or otherwise, and by such approval does not become a party to the agreement.

Approved September 22, 1949.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

CHAUFFEURS, WAREHOUSEMEN AND HELPERS,

THOMAS E. FLYNN,

Acting for Daniel J. Tobin, General President.

MIDWEST AREA



The boundary line referred to as separating the so-called eastern and western parts of the Central States Area starts on the south shore of Lake Superior at Ashland, Wisconsin, and thence runs generally in a direct line to Wausau, Stevens Point, Mauston, and New Lisbon to the Mississippi River at La Crosse, Wisconsin, and thence runs southward via the Mississippi River to the southern boundary of Missouri, as per map agreed to as Exhibit "A" by the Negotiating Committees. The portion of the territory west of such described boundary line is commonly referred to as Midwest Area.

INDEX

Absence, Article IV.....	6
Bonds, Article XII.....	15
Break-downs or Impassable Highways, Article XXI, Section 4.....	19
Call-in Time, Article XXII, Section 2.....	19
City or Local Work, Article I, Section 3.....	2
Compensation Claims, Article XVI.....	16
Contiguous Territory, Preamble and Article VII, Section 2.....	10
Coverage of Contract, Preamble.....	1
Deadheading, Article XXII, Section 5.....	20
Defective Equipment, Article XX.....	18
Discharge or Suspension, Article X.....	14
Dues, Article II.....	3
Employees Covered, Article I, Section 2 (a).....	2
Examination of Records, Article VII, Section 6.....	10
Examinations and Identification Fees, Article XIII.....	15

Extra-Contract Agreements, Article VI, Section 2.....	9
Grievance Machinery and Union Liability, Article VIII.....	11
Grievance Machinery Committees, Article VII.....	9
Guarantees (Minimum), Article XXIV.....	21
Health and Welfare Benefits, Article XXXIV.....	36
Hourly (and Mileage) Rates, Article XXV.....	22
Identification Fees (and Examination), Article XIII.....	15
Lay-overs, Article XXII, Section 3.....	19
Leave of Absence, Article IV, Section 2.....	7
Lodging, Article XIX.....	17
Loss or Damage, Article XI.....	14
Maintenance of Standards, Article VI.....	8
Meal Period, Article XVIII.....	17
Mileage Determination, Article XXV, Section 2.....	24
Mileage and Hourly Rates, Article XXV.....	22
Military Clause, Article XVII.....	17
Multiple Leg Runs, Article XXX.....	28
69 New Equipment, Article VI, Section 4.....	9
Operations Covered, Article I, Section 1.....	2
Owner-Operator Rates, Article XXXII, Section 12 (b).....	31
Owner-Operators, Article XXXII.....	29
Paid-for Time, Article XXII.....	18
Passengers, Article XV.....	16
Pay Period, Article XXI.....	18
Peddle Runs, Article XXVI.....	25
Perishable Commodities Only, Article XXXVIII.....	38
Pickup and Delivery Limitations, Article XXIII.....	20
Posting of Agreement, Article XXXVI.....	36
Protection of Rights, Article IX.....	13
Rates, First and Second Year.....	1
Riders, Article I, Section 5.....	3
Scope of Agreement, Article I.....	2
Seniority, Article V.....	7
Steel Haul Only, Article XXXVII.....	36
Stewards, Article III.....	6
Student Driver, Article I, Section 2 (b).....	2
Subsequent Runs, Article XXIX.....	27
Suspension (or Discharge), Article X.....	14
Termination Clause, Article XXXIX.....	38
Through Runs, Article XXVIII.....	26
Time Off for Union Activities, Article IV, Section 1.....	6
Time Sheets, Article XXXV.....	36
Transfer of Company Title or Interest, Article I, Section 4.....	3
Turn-around Runs, Article XXVII.....	25
Two-Man Operations, Article XXXI.....	28
Uniforms, Article XIV.....	16
Union Liability (and Grievance Machinery), Article VIII.....	11
Union Shop and Dues, Article II.....	3
Vacations, Article XXXIII.....	35
Workweek Reduction, Article VI, Section 3.....	9

70 Q. Now, then, in July of this year Mr. Boston lost his seniority, did he not?—A. His position on the seniority board changed, yes.

Q. It changed from what position?—A. I don't remember.

Q. Well, was it up near the top, do you recall?—A. Yes; I would say he was in the upper half.

Q. And was it reduced?—A. His seniority, do you mean?

Q. Yes.—A. His was in a different position; yes, sir.

Q. And that position, where was that?—A. I would say it was in the lower half.

Q. Didn't it go to the bottom?—A. I don't remember on that particular date whether he was the bottom man or not. I don't think he was. I think that there were other men that were employed during that period. When the union made the seniority list he was somewhere near the bottom. I don't recall actually whether he was the bottom or not.

Q. Who posted the list with his name reduced in seniority?—A. The list was submitted by the union and I personally posted it on the bulletin board.

Q. Did you have anything to do with his reduction in seniority?—A. No; nothing other than our agreement with the union.

Q. And were you told why he was reduced?—A. Officially by the union; no.

Q. Who gave you the seniority list, Mr. Byers, to post?—A. I don't remember.

Q. Well, it was some official of the union, was it not?—A. I don't remember if it came from an official of the union or through the mail from the union.

Q. Well, have you an opinion as to whether or not it came from the union?—A. Oh, yes; it came from the union.

Q. How often do you post changes in seniority at your plant?—A. Oh, I would say it varies. The reason that it
71 varies is that employment turn-over is greater. Why we submit the list more often for this seniority.

Q. You knew why Mr. Boston was reduced in seniority, did you not?—A. Officially, no.

Q. Well, had any act or conduct on his part in the conduct of his job have anything to do in the reduction of his seniority?—A. No; none other than our agreement.

Q. The company didn't demote him, did they?—A. No.

Q. Would you say his demotion came solely as the result of the union?

Mr. MANNING. Just a minute. I object to that as speculation.

Trial Examiner BEAN. Well, it does call for a conclusion. Strike it out. Reform your question, Mr. Scott.

By Mr. SCOTT:

Q. How are your drivers employed in regard to seniority? Does being at the top of the seniority list give them preference on a man below them?

Mr. MANNING. Just a minute. General counsel has introduced an exhibit which contains the seniority provisions. I think the exhibit speaks for itself and the witness should not be questioned as to what is already in writing and in agreement between the parties.

Mr. SCOTT. Well, I am not wanting him to interpret that agreement. I will withdraw whatever the question is now pending and ask you this, Mr. Byers.

By Mr. SCOTT:

Q. What effect did it have on Mr. Boston's employment when he was reduced in seniority?—A. As far as the company is concerned it had not effect on his employment. It effects him in that his position on the seniority board puts him in a bidding position for any job that the men might interpret as a better job.

Q. Well, isn't this also true, that the drivers are called out in their position of seniority?—A. Yes, sir. They are
72 called out according to their bidding position. They bid their position by seniority.

Q. And do you know whether or not Mr. Boston lost some trips as a result of losing his seniority?—A. I can't honestly say, I don't remember.

Q. You could find that out, could you not?—A. Yes.

Trial Examiner BEAN. May I interrupt right here? I don't want to too often.

By Trial Examiner BEAN:

Q. Suppose a man is No. 40 on the seniority list and there were 35 jobs on a given day. I take it he wouldn't work that day, is that correct?—A. That is correct.

Q. Or if he happened to be 15 on that seniority list he would have worked on that given day?—A. That's correct.

Mr. SCOTT. That is all.

Cross-examination by Mr. MANNING:

Q. Mr. Byers, I call your attention to Article 5 on page 7 of the contract which has been introduced as General Counsel's Exhibit No. 2 which is the seniority clause of the contract and also to subparagraph (b) of Article 2 which appears on page 5 of the contract. The last line of this subparagraph (b) reads "After 30 days the employee shall be placed on the regular seniority list." That is correct, isn't it?—A. Yes, sir.

Q. I also call your attention to page 8, Section 4 of Article 5, subparagraph (a) of Section 4, which reads, "In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by the union or unions having jurisdiction over said employees." That is your understanding of the contract, isn't it?—A. Yes, sir.

Q. Whenever there is a merger of the lines or a taking over of haul by your company or some company takes over one of your hauls, the union determines the seniority of the men on that haul and with your company, if it is involved, will be affected?—A. That's correct.

Q. Turning again to Section 1 of Article 5, the last sentence of that section reads, "Any controversy over the seniority standing of any employee on this list shall be referred to the union for settlement." Is it your understanding that all matters of seniority standing of the employees covered by the contract are left to the union for settlement?—A. Yes.

Q. Now, that follows after they become placed on the seniority list by the operation of Article 2 at the end of the first 30 days of employment?—A. Yes.

Q. Section 1 provides that seniority shall be broken only by discharge, voluntary quitting or than a two year layoff. You do not regard, do you, Mr. Byers, a reduction in place on the seniority list as breaking seniority? Do you understand my question?—A. Would you—

Q. I will rephrase it. When we speak of seniority being broken that is the removal from the list entirely, is it not?—A. Yes.

Q. In other words, if a man quit or is discharged or if he is on a layoff for more than two years his name is taken clear off of the seniority list?—A. That's right.

Q. And that is what you refer to as broken seniority?—A. Yes.

Q. If he is reduced in standing on the seniority list that is, from the, for example, the 40th position to the 20th position or rather from the 20th to the 40th position, that is not breaking his seniority or terminating, that is simply reducing it, isn't that true?—A. That is correct.

Q. And the employee remains on the seniority list?—A. Yes; that is correct.

Q. Are you familiar with Section 45 of the bylaws of Local Union 41?—A. No; I am not.

Q. You are not. Are you familiar with the fact that when employees who are members of Local 41 become delinquent for more than a month in their dues to that union their seniority standing is affected by the union's bylaws?—A. Yes; I am.

Q. Have you had instances in the past where employees have become delinquent in their dues and have been reduced in seniority standing?—A. Yes; we have.

Mr. SCOTT. Well, we think that is irrelevant and immaterial and ask that the answer be stricken.

Mr. MANNING. I want to tie it up with some further questions, if the Examiner please.

Trial Examiner BEAN. Of course, it seems to me possibly that you are verging on having the witness put in plain language the meaning of the contract and the bylaws and until such time as you can show that there is susceptible interpretations, I rather feel that you should not go into the interpretations.

Mr. MANNING. I want to show, Mr. Examiner, how they have interpreted it so that it if appears clear to you and appears unambiguous it may not appear so to them because apparently they have interpreted the contract to mean that members who are affected by this bylaw, instances of members being affected by this bylaw, are controversies within the meaning of this Section 1 of Article 5. They have uniformly, I know this area, but all

75 carriers in this area have agreed that those are controversies and that those matters are referred to the union for settlement and there have been literally hundreds of cases.

Now, certainly the testimony of this witness and other witnesses as to their interpretation of that section of the contract should be material and relevant since they are the ones who live under the contract and who are affected by it.

Trial Examiner BEAN. I am disposed to give both parties ample opportunity to offer evidence that they feel is relevant in the issues but it seems to me that this point, so far as we have gone, that would really be a fundamental issue here and that is whether or not I assume the general counsel contends there was an enforcement or application of an illegal union shop contract and still further that the general counsel contends that by enforcing or applying that illegal union shop contract the respondent union caused the employer to discriminate against Mr. Boston in regard to a condition of employment thereby encouraging membership in the union. Is that in substance your case, if I am getting the issue?

Mr. SCOTT. Well, I think that is one issue. They have in effect had an agreement for a union shop. Article 2 says that the unions shall be the sole representative of those classifications of employees covered by this agreement and the employer agrees that any and all employees within the classification of work herein provided shall be members of the union in good standing as a condition of continued employment.

Mr. MANNING. Mr. Examiner, he doesn't read you the paragraph on page 4.

Mr. SCOTT. I am reading Article 2 on page 3.

Mr. MANNING. Yes. And continuance of Article 2 on page 4, second paragraph says, the above paragraph which is the one he just read, shall not apply to any union, party to this agreement, until such time as it is properly certified by the National Labor Relations Board as being authorized to enter into such agreement, nor shall it apply in any state where prohibited by state law. See, we haven't agreed that there has been any U. A. election. That paragraph would apply and the Section 1 of Article 2 would not apply to this union.

Trial Examiner BEAN. Well, I will allow that last question that we started out discussing. So far it seems reasonably clear to me what the intention is of the meaning of Article 5, Section 1, and also the meaning of Section 45, bylaws. But it may be someone else reviewing, or whenever I do, will find that they are not so cocksure of themselves as I am at this time and hence will want to read our interpretation and over the objection of the general counsel I will allow that question. But I don't think it should be gone into in great detail.

Mr. MANNING. Well, I will not spend too much time on it. However, I feel that it is important particularly in view of the fact that we have had a similar clause before another Trial Examiner who took the position that it was not ambiguous and while the wording itself may be said to be unambiguous, apparently the parties to this contract have interpreted it to mean that it did include these instances where employees were affected by the non-payment of their dues and their bylaws set-up.

By Mr. MANNING:

Q. Now, Mr. Byers, you and your company have always interpreted the last sentence of Section 1, "Any controversy over the seniority standing of any employee on this list shall be referred to the union for settlement," to include instances where union members have become delinquent in their dues and have been reduced in seniority standing?—A. That is correct.

Q. The phrase, "Any controversy" as I understand it, includes such instances?—A. Yes, it does.

Q. Do you regard the fact of their having a standard which has been affected by their failure to pay their dues as a controversy which is included under Section 1 of Article 5?—A. That's correct.

Q. And I believe you have already testified that in your own company there have been many other instances where people have been, men have been reduced in seniority standing as a result of

their failure to pay dues and you have treated this contract in that manner?—A. That's correct.

Q. You did understand, as I believe, that the union did have a bylaw which called for reduction in seniority standing upon non-payment of dues?—A. That's right.

Q. Can you give us some specific instances of other men who have been reduced in seniority standing because of their nonpayment of union dues?

Mr. SCOTT. We think that is irrelevant, incompetent, and we object to it.

Trial Examiner BEAN. I think you have gone far enough, Mr. Manning. The witness has testified that there were other instances and I will exclude any further questioning along that line.

Mr. MANNING. As long as there isn't any question about the witnesses's memory or testimony in regard to it, I don't make any offer of proof.

Trial Examiner BEAN. It stands undeniably at the present time, at least.

Mr. MANNING. Yes.

I believe that is all.

Redirect-examination by Mr. SCOTT:

Q. Mr. Byers, does your company have any control over the seniority of your employees?—A. All question of seniority are referred to the union.

Q. The union has the sole authority to fix the seniority of the employees?—A. Yes.

78 Mr. MANNING. Just a minute. I object to that as argumentative.

Mr. SCOTT. I am merely summing up what he said.

Mr. MANNING. The fact is that the contract first fixes the question of seniority and their standing on the seniority list from that time on is then referred to the union by the contract.

Trial Examiner BEAN. I will allow the question. Do you understand the question? The question was, the union has sole control over the seniority. Can you answer that or have you? A. I don't know whether I have answered it or not. I would say, as Mr. Manning said, after their employment they have sole control over the employees seniority.

By Mr. SCOTT:

Q. When the union notifies you that an employee has lost his seniority, you do not dispute that fact, is that right? A. When we get a published list we operate according to the published seniority list, that is right.

Mr. SCOTT. I think that is all.

Re-Cross-Examination by Mr. MANNING:

Q. When you said, after their employment, you meant after the 30 days, the first 30 days of their employment?—A. After their selection and 30-day trial period.

Q. Once they go on the seniority list in compliance with the contract after the first 30 days of employment, the questions with respect to their standing on that seniority list are referred to the union for settlement?—A. That is right.

Q. All such questions?—A. Yes.

79 Q. Including these controversies over their having paid their dues and so forth?—A. Yes; all questions, any questions.

By Mr. SCOTT:

Q. When does an employee first have seniority standing?—A. I believe that an employee's seniority dates from his anniversary date of employment.

Q. Well, do you know anything about an employee's seniority before his name appears on a list that is furnished you by the union?—A. No, no. Well, we use the date, anniversary date tells us the time the entire employee's list is submitted to the union and they in turn give us a list which includes everybody.

Q. But they place an employee on the seniority list and show his place on the seniority list?—A. Yes.

Q. And you have nothing whatever to do with that?—A. No.

Mr. SCOTT. I believe that is all.

By Trial Examiner BEAN:

Q. Assuming you have 50 truck drivers and I should come to you today as No. 51 and not a member of the union, I want a job and you need me and you hire me, just what happens? Tell me, just trace my course up for a few weeks.—A. You apply for a job. We have a screening service that we send the employees through. After they come back, they come to us. If they are acceptable to that screening service we give them a student trip. After they make their student trip they fall into a position beneath the lowest man on the seniority board and make trips according to that, at which time their name is submitted to the union and they in turn give us the man's seniority standing in our company. If somebody quits, then you move up. If for any reason—

80 Q. And if I were accepted and went through that training and in all probability after a few weeks I would be certified by the union as No. 51, the lowest man on the seniority list?—A. That is correct.

By Mr. Scott:

Q. Suppose the union does not place a man on the seniority list. Then what happens?

Mr. MANNING. Wait a minute. That is assuming facts not in evidence. The contract provides that after 30 days of employment he automatically goes on the seniority list and so the question would be asking for an assumption or something that could not take place.

By Mr. Scott:

Q. Now, when Mr. Boston was reduced in his seniority, how was he able to acquire new seniority?—A. His seniority is the same as longevity. I mean time accumulates for a man.

Q. But he has to start actually from scratch and build up again?

Mr. MANNING. Just a minute. I object to that as not being intelligible.

Trial Examiner BEAN. Let me ask the question and see if there is any objection. Don't hesitate to object to my question if you think you should.

By Trial Examiner BEAN:

Q. There is no question that Mr. Boston's seniority was reduced down from a relatively high point to a relatively low point, is that correct?—A. That is correct.

Q. Does that mean he was then in a status of a man who had just started working and until those fellows above him died off, work up to the top again?—A. That is correct.

Q. He was about in the position of a newly hired employee?—A. Yes. It doesn't affect a man in such things as vacation. It does not affect him by his seniority standing. His seniority
81 is like I have said before, in his position, his ability to bid for a job that he might consider better than the one he is now in.

Q. Or to get a job when there are a few jobs?—A. Yes.

By Mr. MANNING:

Q. Other benefits of the contract which accrue to length of service are still his?—A. That's correct.

By Mr. Scott:

Q. In the event of a layoff, what employees would be laid off first?—A. The men laid off start at the bottom of our seniority list.

Mr. MANNING. I have no further questions.

Trial Examiner BEAN. Off the record.

(Discussion off the record.)

Trial Examiner BEAN. On the record.

By Mr. MANNING:

Q. Were there others on the list at the time that Mr. Boston was reduced who also were reduced to that same list?—A. Yes; there were.

Q. And were their names below his on the seniority list?—A. I don't remember. I don't remember whether they were below or above his.

By Mr. SCOTT:

Q. How many men did you have on your list at that time, Mr. Byers?—A. I believe there were fifty some men on the Kansas City seniority list.

Mr. MANNING. That is all.

By Trial Examiner BEAN:

Q. It is claimed that Mr. Boston was reduced from the 18th position to 54th position. Do you know offhand whether or not that is so?—A. No. I am not that familiar with it that I would know.

Q. You would be able to determine that from some record that you have if it is correct or if it is not correct?—A. Yes; that is correct.

82 Mr. SCOTT. That is all.

Trial Examiner BEAN. All right. You are excused.

Witness excused.

Trial Examiner BEAN. Call your next witness.

JAMES FRANK BOSTON, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. SCOTT:

Q. Will you please state your full name?—A. James Frank Boston.

Q. And where do you live, Mr. Boston?—A. 820 Tauromee Avenue, Kansas City, Kansas.

Q. What is your business, Mr. Boston?—A. I am a truck driver, Byers Transportation.

Q. And how long have you been with Byers Transportation?—A. A little over four years.

Q. Are you a member of Local 41?—A. Yes, sir.

Q. And how long have you been a member of Local 41?—A. Continuous?

Q. Yes, sir.—A. Well, I transferred out of there, I think it was '44.

Q. When did you first join 41?—A. 1936, I think it was.

Q. And how long did you remain continuously thereafter?—A. Until I went to the army, that was in '43, I think.

Q. And what did you do then with respect to the union?—A. I took a withdrawal card.

Q. Took a withdrawal card. Now, when did you go back into the union?—A. Sometime in '44, early part of '44.

Q. And was it Local 41 that you rejoined?—A. Yes.

83 Q. Then how long did you remain in '41?—A. Not very long. I transferred.

Trial Examiner BEAN. '41 or '44?

Mr. SCOTT. '44.

By Mr. SCOTT:

Q. You went back in after you left the army, you went back in '43 and remained until '44, is that right?—A. No; I went out in '43 to the army and come back early in '44 and then I went to Seattle, Washington, and was transferred into 174.

Q. Is that the same type of a local as 41?—A. Yes.

Q. How long did you stay in 174?—A. I just don't remember, but it wasn't very long.

Q. Then what happened?—A. I came back to 41.

Q. Came back to Kansas City?—A. Yes.

Q. And would you say then that you have been in 41 continuously since the last time, since about 1945?—A. Yes.

Q. And when did you go to work for Byers the last time?—A. I think it was '46.

Q. 1946?—A. Yes.

Q. And have been with them continuously since that time?—A. Yes.

Q. Are you still a member of 41?—A. Yes.

Q. Have you ever lost your membership since 1946?—A. No.

Q. Now, what is the highest rank in seniority that you obtained since you have been with Byers Transportation Company?—A. You mean what position?

Q. On the list; yes.—A. Well, I am pretty sure it was 18.

Q. 18. And when were you 18th on the list?—A. Last day of June.

Q. Last day of June. Now, then, from the first day of July, it would be the first day of July, when were you reduced in seniority?—A. Well, you are automatically reduced when you don't pay your dues.

84 Q. Tell what happened in regard to paying your dues?—

A. If you fail to pay your dues on the second day of the following month you automatically lose your seniority.

Q. Well, did you fail to pay your dues?—A. I failed to pay my dues.

Q. For what month?—A. June 1950.

Q. And when did you pay your June 1950 dues?—A. I think it was the fifth day of July.

Q. And what other months did you pay for them?—A. What months did I pay for then?

Q. Yes. Do you have a receipt there with you?—A. I have a stamp. Paid June and July.

Q. You paid your June and July 1950 dues on July 5, 1950?—A. Yes.

Q. Now, when you paid your June dues on July 5, 1950, were those June dues delinquent?—A. Yes.

Q. How long had they been delinquent?—A. Since the first day of July. As far as that goes they were delinquent from the first day of June. They are due on the first day of June. You don't lose anything if they are not paid until the first day of July.

Q. Do your by-laws provide that you can pay your dues any time during the month they are due up to and including the first day of the following month? For instance. Let me withdraw that question. When was the last time that you had under the bylaws to pay your June 1950 dues?—A. Without penalty?

Q. Without penalty.—A. First day of July.

Q. 1950?—A. 1950.

Q. So when you paid your dues on July 5, 1950, for June, you were then four days past the day when the penalty started?—A. That's right.

Q. Now, what penalty did you receive for failing to pay your June dues?—A. Reducing to the bottom of the list.

85 Q. You were reduced to the bottom of the list?—A. Yes.

Q. And what was your number then?—A. Fifty-four.

Q. You went from the 18th to the 54th on the seniority list?—A. Yes.

Q. What is your position on the seniority list now?—A. I don't know.

Trial Examiner BEAN. What?

A. I don't know.

By Trial Examiner BEAN:

Q. The last time you did know, what was your position?—A. Well, the last time that I paid any attention to it was when the new seniority list was put up. There has been, oh, I don't know. There was over a dozen below me now.

Q. Has any list been posted since you were posted as 54th?—A. No.

By Mr. SCOTT:

Q. Well, was that 54th position, was that the bottom position of the list?—A. Yes; the last name on the list.

Q. And why were you reduced to that position?—A. Because I didn't pay my June dues.

Q. Because you didn't pay your June dues by July 1, 1950?—A. Yes.

Trial Examiner BEAN. Off the record.

(Discussion off the record.)

Trial Examiner BEAN. Back on the record.

By Mr. SCOTT:

Q. Now, as a result of being reduced in seniority, what effect was there on your work?—A. Well, there wasn't much effect on it because business has been good.

Q. Did you lose any trips?—A. I lost, oh, a couple.

Q. And what was the value of those trips?—A. You mean what we get?

86 Q. What would you have got for making those trips?—A. I would have got \$28.05 for each one.

Q. So that you then lost \$56.10 in trips as a result of being reduced in seniority?—A. I would say that is about right. I wouldn't say exactly I had lost it because if business hadn't been as good as it was, I had lost the seniority and I would have been laid off.

Q. You couldn't have made those trips if you wanted to?—A. No; not those two.

Mr. SCOTT. I think Mr. Byers testified to this but I want to get this witness's answer.

By Mr. SCOTT:

Q. When lay-offs do occur down with the company, what men are selected first?—A. The bottom ones.

Q. At the bottom?—A. That's right.

Q. Now, in order for you to get back the seniority that you lost, what has to take place?—A. Time. You don't get back what you lost.

Q. Beg pardon?—A. You don't get it back.

Q. Is it permanently taken away from you?—A. Yes, sir.

Q. Were you told why you lost your seniority?—A. I knew. I didn't have to be told.

Q. Are you familiar with the bylaws?—A. Yes, sir; I think I am.

(Thereupon a document was marked as "General Counsel's Exhibit No. 3" for identification.)

Q. I am going to hand you what has been identified as General Counsel's Exhibit 3 and ask you to examine it and then tell what it is.—A. Bylaws, 41 bylaws.

Q. And were those bylaws in effect at the time you lost your seniority? A. Yes, sir.

Q. And I will call your attention to Section 45 on page 19.—A. I know about it.

87 Q. And is that the provision under which your seniority was taken away from you?—A. Yes, sir.

Mr. SCOTT. We would like to produce into the record General Counsel's Exhibit 3, bylaws of the Local Union No. 41.

Mr. MANNING. No objection.

Trial Examiner BEAN. Without objection it is admitted.

(The document heretofore marked "General Counsel's Exhibit No. 3" for identification was received in evidence.)

Mr. SCOTT. Cross-examination.

Cross-examination by Mr. MANNING:

Q. You are here under subpoena that was obtained by the General Counsel, aren't you?—A. Yes, sir.

Q. As a matter of fact, you have requested the regional director, Mr. Hugh Sperry, to permit you to withdraw the charge which you filed in this case, haven't you?—A. Yes, sir.

Q. And Mr. Sperry denied you that privilege?—A. Yes, sir.

Q. And you actually are testifying here against your own will, is that true?—A. In a manner speaking; yes.

Q. Now, the decision to withdraw the charge was one that you made yourself, wasn't it?—A. Yes, sir.

Q. No official or representative of the union itself threatened you or coerced you?—A. No, no. The only thing about the official of the union, I just merely asked him how I could go about withdrawing. I decided to withdraw the case and I called Frank McGuire, I think he belongs to the union of ours, and I called him and asked him how I go about withdrawing.

Q. Now, you remember, Frank, when Section 45 of the bylaws, which is this section with respect to forfeiting

(Continued on p. 71.)

General Counsel's Exhibit 3

88 BYLAWS OF OVER-THE-ROAD AND CITY TRANSFER DRIVERS,
HELPERS, DOCK MEN AND WAREHOUSEMEN LOCAL UNION
No. 41

AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, KANSAS
CITY, MISSOURI

89 Some pay their dues when due.
Some pay when overdue.
Some never due.

How do you due?

90 Bylaws of Over-the-Road and City Transfer Drivers,
Helpers, Dock Men and Warehousemen, Local Union No.
41 affiliated with International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America, Kansas City, Missouri.

91 OBJECTS

To organize under one banner all workmen engaged in the craft, and to educate them to cooperate in every movement which tends to benefit the organization; to impress upon our membership, our employers, and the public that it is to the advantage of all concerned that workers be organized; the organization of our craft requires honest and intelligent membership, adapted to the business; we teach our membership the advantages, benefits and importance of their industrial position, and we endeavor to build up and perfect a labor organization in conformity with the highest standards of our American and Canadian citizenship; we seek to improve the industry and by increasing the efficiency of the service and by instilling confidence, good will and understanding between our membership and their employers, which will have the

92 effect of preventing unnecessary conflicts or serious misunderstandings between the membership and their employers, and which will further encourage cooperation and fair dealing with all employers so as to secure for our membership reasonable hours, fair wages and improved working conditions.

ORGANIZATION

SECTION 1. This organization shall be known as the Over-the Road and City Transfer Driver, Helpers, Dockmen and Warehousemen, Local Union No. 41, A. F. of L. affiliate, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

SEC. 2. The officers of this Union shall consist of President, Vice-President, Recording Secretary, Secretary-Treasurer and three Trustees.

SEC. 3. All officers collecting or handling the Local Union's funds shall be bonded; premium to be paid for by Local Union No. 41.

DUTIES OF OFFICERS

SEC. 4. The President shall preside at all meetings of
93 this Local, appoint all committees not otherwise ordered,
and transact such other business as the Local may direct;
sign all orders on the Secretary-Treasurer authorized by the Local
Union. He shall see that the laws as laid down by the By-Laws
are enforced. Warden and Conductor to be appointed by the
Chair. The President shall call the meeting to order and in
case of the absence of the President, the Vice President shall
preside, in absence of both, the Recording Secretary shall perform
that duty, and the Local shall proceed to elect a Chairman, who
shall conduct the meeting until the arrival of the proper officers.

SEC. 5. The President and Business Representative shall be in
active service during the term of his office to transact such business
as needs his attention at all times; to look after the interests of the
Local and assume the duty of Business Agent. The Presi-
94 dent shall be a member (ex-officio) of all committees, and
shall be responsible for their actions.

SEC. 6. The Vice President shall assist in keeping order, and
in the absence of the President, preside at the meetings of the
Local. He shall assist the Warden and see that no one enters the
meeting without the pass-word. He shall give the pass-word to
members only, when requested to do so by the President or Secre-
tary-Treasurer.

SECRETARY-TREASURER

SEC. 7. Secretary-Treasurer, immediately upon taking the office
of Secretary-Treasurer shall procure a suitable surety bond, pre-
mium on said Bond to be paid for by Local Union No. 41, and a
copy of the same must be filed in the General Office at Indianapolis.

SEC. 8. Local Secretary-Treasurer shall deposit all moneys of
the Local Union in a reliable bank in the name of the Local Union
at least twice a month or oftener, if possible, as the Local
95 Union may designate from time to time.

SEC. 9. Local Secretary-Treasurer must pay all bills by
check, countersigned by the proper officials of the Local Union.

SEC. 10. Local Secretary-Treasurer must balance his day book
and cash book monthly, showing the exact balance on hand with
the Local Union on the first day of the coming month, and have his
bank book balanced on the last day of the month or get a bank

statement from the bank on the last day of the month, showing the exact amount of money in the bank, so that the Trustees of the organization may verify the bank statement and the books of the Local Union at any time.

SEC. 11. Local Secretary-Treasurer must keep the International bookkeeping system, consisting of a day book, ledger and cash book.

SEC. 12. Local Secretary-Treasurer must receive a
96 voucher properly signed by the President and Recording Secretary for all bills that are ordered paid by the Local Union.

SEC. 13. Local Secretary-Treasurer must keep the applications of all new members initiated filed monthly.

SEC. 14. Local Secretary-Treasurer must keep all receipted bills with a voucher of the Local Union attached to same and filed monthly.

SEC. 15. Local Secretary-Treasurer must attach all return checks to the stub in the check book of the Local Union each month, when he receives his cancelled checks from the bank.

SEC. 16. Local Secretary-Treasurer shall report to the General Secretary-Treasurer on the first day of each month, the number of men that are being carried on the books of the Local Union as good standing members, and all new members who have been initiated during the previous month and all members who have paid up their back dues and again become in good standing. This
97 report must be made on the monthly report blank that is issued by the General Secretary-Treasurer.

SEC. 17. Local Secretary-Treasurer must pay to the General Secretary-Treasurer thirty (30) cents out of every due collected by the Local Union.

SEC. 18. Local Secretary-Treasurer must report the names and addresses of all members in good standing in the Local Union.

SEC. 19. Local Secretary-Treasurer cannot and must not carry any men on their books as members of the organization and mark them exempt from paying dues.

SEC. 20. Local Secretary-Treasurer on the monthly audit of the Trustees must see that the Trustees sign his books, if the Trustees of the Local Union have found them correct and the bank balance verified with the balance on the books of the Local Union.

SEC. 21. Local Secretary-Treasurer must see that the
98 Chairman of the Trustees forwards a copy of the monthly audit, properly signed by the Trustees, showing the balance on hand with the Local Union to the General Secretary-Treasurer.

SEC. 22. When the term of office of a Local Secretary-Treasurer expires and his successor is elected to take his place, he must see that his successor is properly bonded and a copy of the bond sent

to the General Office before he transfers the funds of the organization to his successor in office.

EMPLOYMENT OF CLERICAL HELP

SEC. 23. The President and Secretary-Treasurer shall have the power to employ such clerical assistance as may, from time to time, be necessary. Such help shall be paid reasonable salaries from the general fund, all of which shall be subject to the approval of the Executive Board of Local Union No. 41.

RECORDING SECRETARY

99 SEC. 24. The Recording Secretary shall keep correct, full and impartial account of the proceedings of each meeting of the Union, and must be read at each regular meeting of the Local for action; see that all applications for membership are properly filled out; notify candidates when they have been elected for membership; sign all orders on the Secretary-Treasurer, and perform such other duties as the Local Union or Constitution may direct. He shall work in harmony with the Secretary-Treasurer.

WARDEN

SEC. 25. The Warden shall have charge of the inner door and shall not admit any member who is more than three (3) months in arrears, unless authorized to do so by the Secretary-Treasurer, and shall not allow any member under the influence of liquor to enter the hall.

CONDUCTOR

100 SEC. 26. The Conductor shall attend all meetings and assist the President in keeping order and take up the password at each meeting.

TRUSTEES

SEC. 27. The Trustees shall be custodians of all property of this Union; they shall audit all books and accounts at the expiration of each month and make a written report at the next regular meeting. The Chairman of Trustees must see that a copy of the monthly report is signed, showing the balance on hand with this Local and sent to the General Secretary-Treasurer and see that the Local Secretary-Treasurer is properly bonded.

BUSINESS REPRESENTATIVE

SEC. 28. The Business Representative shall act as Organizer and shall endeavor to settle all difficulties between Employer and the Union, he shall transact all business outside the business office of the Union. He shall be the recognized representative of
101 the Union to the Employers and the General Public. As Organizer he shall assist under instructions of Secretary-Treasurer in collection of dues and assessments, receipt for all money collected in discharge of his duties, paying over same to the Secretary-Treasurer without delay, and such other duties as may from time to time be requested from him by the Local Union.

SALARIES OF OFFICERS

SEC. 29. The salaries of all officers of the Union shall be set by the Local Union.

MEMBERSHIP

SEC. 30. (a) Any person 18 years or over, of good moral character, employed in the craft or the various departments over which this Local Union No. 41 has jurisdiction, shall be eligible to membership in this organization. Provided, that hereafter no person shall be eligible for membership in this organization who
102 has not declared his intention to become a citizen of the United States, if a resident of the United States, or of Canada, if a resident of Canada, or who, having declared such intention, has permitted same to lapse.

(b) No person shall be entitled to membership in this Organization who owns or operates more than one team or vehicle. The General Executive Board, when they deem it advisable or for the best interest of our International Union and upon the recommendation of the Local, may allow a man to own more than one team or vehicle and hold membership, provided that he hires or employs none but members of our International Union and that he drives a vehicle himself and pays the driver the prevailing rate of wages in the locality.

(c) Any man owning and operating but one team or automobile is entitled to membership in our Organization. This will also permit the owner of one team or automobile to hire a helper
103 in case he is sick or disabled or working for his Local Union or for the International Union. He may get a substitute to work for him, but the substitute must be a member of

the International Organization. No individual owner or vendor shall be permitted to vote on a strike involving journeymen, nor shall they be permitted to vote on wages and working conditions, nor shall they be eligible for office of Local Union No. 41.

SEC. 31. The Initiation Fee shall be not less than five (\$5.00) dollars.

SEC. 32. Any person who desires to become a member of the Over-the-Road and City Transfers Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, must fill out the regular application blank and sign his name to it and have the same to be approved by the body at a regular meeting as a voucher for the applicant's fitness to become a member and after being passed upon it shall be filed in the Secretary-Treasurer's office for future reference.

104 SEC. 33. The full Initiation Fee shall be not less than five (\$5.00) dollars and must be paid in full before the application will be received. Upon payment of same, he shall receive a monthly button, if rejected same to be returned to the Local Union.

SEC. 34. All applicants must pay monthly dues of two dollars and fifty cents (\$2.50) beginning the month following the date of application.

SEC. 35. Any applicant who has been rejected shall have his money refunded.

SEC. 36. Any person who has been expelled, suspended or rejected in any Local Union shall not be eligible to membership in this Local Union, except by consent of Local Union of which he has been a member or from which he has been rejected.

SEC. 37. When a applicant has been objected to, the reason for such action shall be investigated by the Executive Board, and if the reason for such objection is found to be good, he shall
105 not be eligible to membership for a period of three months from date of such rejection.

SEC. 38. Transfer Cards must be renewed after thirty (30) days, unless deposited with the Local Union nearest to where the member is at work.

SEC. 39. Any member of the International Union leaving our employment or going to work at another craft or occupation, must be given an honorable withdrawal card and cannot remain a member of the International Union; but before a withdrawal card is issued the individual must comply with all rules and laws of the Local and International Union.

SEC. 40. Any ex-member out on a withdrawal card and desiring to return to membership must first deposit his withdrawal card with the Local Union by which it was issued; and upon the withdrawal card being accepted, the member shall be subject to the

rules and laws of the Local Union. This Card Must Be Renewed by the Individual Once Every Twelve Months.

106 SEC. 41. Local Unions must not accept withdrawal cards if the member has committed any offense while out on withdrawal card which would be injurious to union principles. Also if the Local Union is paying benefits and the member has fallen into bad health or is liable to become a charge against the Local or International Union, acceptance of the withdrawal card can be refused by the Local Union.

DUES AND ASSESSMENTS

SEC. 42. Dues of the Local Union No. 41 shall be not less than two dollars and fifty cents (\$2.50) per month, payable on or before the first day of each month. To be in continuous good standing, a member must pay his dues on or before the first of the month, in advance.

SEC. 43. Local Union No. 41 may make such fines and assessments upon its members as the interests of the Union shall 107 demand, and all assessments and fines must be paid before dues are accepted.

SEC. 44. All members who are three (3) months in arrears for dues shall stand suspended and deprived of all rights, privileges and membership, but can be reinstated upon payment of amount of dues. Any member failing to be reinstated during the fourth (4th) month shall pay a reinstatement fee of two (\$2.00) dollars in addition to amount due. A suspended member shall not be eligible to reinstatement or become a member of any other Teamsters' Local Union before paying all back dues and assessments to Local Union No. 41. It shall be understood that this Local Union shall not waive jurisdiction over any member, his name shall remain on the books of this Organization until such time as he is released, either by Withdrawal Card, Transfer Card, expulsion or death.

SEC. 45. Any member, under contract, one month in arrears 108 rears for dues shall forfeit all seniority rights.

(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues.

SEC. 46. The Executive Board shall have the power to call a special meeting or transact all necessary business of the Union between meetings and to them shall be referred all matters not otherwise disposed of, they shall decide all disputed questions in reference to the Constitution and Bylaws and perform such other duties as this Local Union may require.

MEETINGS

SEC. 47. The regular meetings of Local Union No. 41 shall be the first and third Wednesday at 8 p. m., and the second Sunday at 10 a. m. of each month. All members are compelled to attend at least one meeting per month or shall be fined one (\$1) dollar, to be paid before dues are accepted.

109 SEC. 48. A Special Meeting of the Union can be called by any ten (10) members, sanctioned by the President, but no business shall be transacted except that named in the call; all members shall be notified.

SEC. 49. A quorum shall consist of seven (7) members in good standing.

SEC. 50. Nominations of Officers shall take place at the first meeting in December and the election at the last meeting in December. To be eligible for office member must be in continuous good standing for two (2) years. The Officers elect may be installed at the same meeting at which they are elected. The Australian Ballot shall govern all elections. All candidates for office must be present when nominated. The terms for President, Vice-President, Secretary-Treasurer and Recording Secretary shall be five (5) years.

SEC. 51. The Business Representative of Local Union No. 110 41 shall be elected the same as any other officer; but can be removed at any time for incompetency, dishonesty or neglect of duty, or if there are no funds in the Local Union to pay his salary. He shall be given a trial, the same as any other officer.

SEC. 52. The Trustees shall be elected in the following manner: One for three (3) years, one for two (2) years, and one for one (1) year, thereafter the one Trustee shall be elected each year for a term of three years.

COMMITTEES

SEC. 53. Special Committees may be appointed from time to time, as deemed necessary, who shall act promptly on matters referred to them and who may be discharged at the will of the Union.

SEC. 54. All Committees shall perform the duties assigned them within the time specified and report such results back to the Union in writing.

111

RULES

SEC. 55. All disputes between Local Union No. 41 and the Employers may be settled by negotiations if possible. Upon failure to settle any grievance or dispute by negotiating, this Local Union shall take a secret ballot upon the question as to

whether or not a strike shall be ordered. A majority of two-thirds of the members present at the meeting to decide.

SEC. 56. No raffle tickets to be sold or collections will be permitted in the hall during the Local sessions.

SEC. 57. When charges are preferred against any member of this Local, the member preferring same shall put charges in writing, the same to be referred to the Executive Board without debate. Any member shall have the right to an appeal to the Joint Council if he considers the decision of the Local Executive Board to be unjust; said appeal must be taken up not later than the
112 second meeting of the Council, and must be in writing, party taking appeal to hold himself in readiness to appear before the Joint Council on their order.

SEC. 58. It is compulsory for all members to carry their books with them at all times while working.

SEC. 59. The International Brotherhood reserves the right to cancel Withdrawal Cards, and should any person in legal possession of one violate the Constitution or antagonize the principles of Trade Unionists, he shall be suspended from the Brotherhood.

SEC. 60. It shall be the duty of every member of this Local to show due respect to and sustain its officers in the proper discharge of their duties.

SEC. 61. All members of this Union shall at all times wear his button in plain sight so it can be seen by any one.

SEC. 62. Any members working for less than the minimum rate of wages recognized by this Union under contract or specified work, shall be fined not less than twenty-five (\$25) dollars for the first offense and upon the second violation of this
113 rule shall be expelled from the Union.

SEC. 63. Religious or political discussions are strictly prohibited.

SEC. 64. Should any officer of this Local Union fail to answer the roll call for three consecutive meetings, unless he can show a just cause for being absent, his office shall be declared vacant by the President, and an election to fill said vacancy will take place at the following meeting.

SEC. 65. All business done in this Local shall be strictly secret to all outside the local.

SEC. 66. All members shall acquaint themselves with all rules as laid down by these Bylaws, as ignorance of said rule shall constitute no excuse.

SEC. 67. No member of this Union shall try to disrupt the Union or injure it in any shape, form or manner, or persuade
114 members to drop out of the Union, are subject to fine or suspension, with proven guilt.

SEC. 68. No member shall be entitled to vote unless in good standing on day of election.

SEC. 69. These laws to be in force as soon as adopted.

SEC. 70. All amendments must be in writing and read at the meetings before adopted.

RULES GOVERNING DEATH DONATIONS

This Death Fund is purely voluntary. The benefits extended to the members of Local Union 41 are a pure and voluntary donation by the Local Union, provided that the member has complied with the following rules governing same. But under no consideration should this article be construed to mean that a member is paying any dues directly into this fund, or that any part of his dues are taken as payment of premium for this donation. All members' death certificates for death will come before the Local Executive Board for passage for approval. In the event that technicalities arise and the Local Executive Board does not deem it advisable to approve a donation, same will be taken up with the Local Union for their approval who will decide by a two-thirds majority vote of the members present, and this action will be final and binding. The Local Union and the Executive Board will be governed by the following rules:

SECTION 1. A Death Donation shall be donated to all regular dues-paying members of Local Union No. 41, after holding membership in Local Union No. 41, for six (6) consecutive months after becoming a member by paying initiation fee, transfer card, returning on a withdrawal card or reinstatement.

SEC. 2. A member taken sick or dying owing dues for the previous month shall be debarred from all donations.

SEC. 3. If a member is not paid up at the time of sickness or death he cannot then pay up and be entitled to donations.

SEC. 4. In case of death the office must be notified at once, either in person or in writing, and a death certificate must be furnished to Local Union No. 41.

SEC. 5. At the death of a member who has been a dues-paying member for six months (inclusive) from the time of initiation, depositing Withdrawal Card, transferring in, or is reinstated and is in good standing at the time of death the Local Union shall make a donation of \$300.

SEC. 6. If a death donation is to be paid, by the Local Union, it shall be paid to the widow of the deceased; if there shall be no widow, of deceased, then the said donation shall be paid in equal shares to the surviving children of the deceased, if any; if the deceased shall leave neither a widow nor children, then the said donation shall be used by the Local Union to pay the funeral expenses of the deceased; provided, however, that the Local Union shall not pay any of the funeral expenses which are

in excess of the amount of the donation payable as given in Section 5.

SEC. 7. At the death of any member of Local Union No. 41 or any member of the immediate family of a member a floral offering to cost \$10 shall be donated by Local Union No. 41.

SEC. 8. The Secretary-Treasurer, upon satisfactory information and proof of a member's death, and a signed death certificate shall present the Local's donation in check form, signed by the President and Secretary-Treasurer.

SEC. 9. All donations to be made in check form to beneficiaries by Secretary-Treasurer.

SEC. 10. The Secretary-Treasurer must keep all death certificates and file same for future reference.

SEC. 11. In the event of an epidemic this Organization reserves the right to stop making death donations.

118 SEC. 12. These By-Laws cannot be suspended, added to or dispensed with unless by two-thirds majority vote of the entire membership in good standing.

Any rules herein not mentioned or provided for shall be governed by Roberts' Rules of Order.

RULES OF ORDER

SECTION 1. The President, while presiding shall state every question coming before the Union before suffering debate thereon, and immediately before putting it to a vote shall ask, "Is the Union ready for the question?" Should no member arise to speak and the Union indicates their readiness, he shall rise to put the question. After he has risen no member shall be permitted to speak upon it.

SEC. 2. When the decision of the President is appealed from, he shall state his decision and the reason therefor from the Chair. The appealing party shall then briefly state his objection. The question shall be put thus: "Shall the decision of the Chair stand as the judgment of the Union?"

SEC. 3. Every member, while speaking, shall adhere to the question under debate as well as any reflection on any member thereof.

SEC. 4. Any member while speaking, being called to order by another, at the request of the Chair, shall cease speaking and be seated until the question of order is determined.

SEC. 5. No member shall speak more than once on the same question until all members wishing to speak shall have an opportunity to do so, nor more than five minutes at one time.

SEC. 6. No member shall enter or leave the hall during the reading of the minutes, admission of new members, installation of

officers or the taking of a question by yeas or nays, and no member shall be allowed to leave the hall without permission of the presiding officer.

120 SEC. 7. When a motion has been declared carried or lost by acclamation, any member, before the Union proceeds to other business, may call for an account, but the yeas and nays cannot be called unless demand before the President rises to put the questions.

SEC. 8. The yeas and nays may be called by two members, and upon the assent of one-third of the members present shall be so taken.

SEC. 9. A motion to adjourn having been put and lost shall not be in order again, provided, there is further business before the Union, until fifteen (15) minutes have elapsed.

SEC. 10. All other proceedings in debate not herein provided for to be guided by Roberts' Rules of Order. One tap of the gavel shall call to order, three taps to arise.

ADVICE TO STEWARDS

SECTION 1. Stewards shall examine all working cards once a month, and examine all cards when new men are employed.

121 Any member failing to respect the Steward of any barn in discharge of their duty shall be reported for his action, and such member shall be subject to a fine as ordered by the Executive Board.

SEC. 2. Become acquainted with the laws of the I. B. of T., C., W. and H. of A. and your Local Union.

SEC. 3. Become acquainted with the agreement of your Local and Employers.

SEC. 4. Examine the due books of every member working in the barn in which you are Steward not later than ten (10) days prior to the first of each month.

SEC. 5. When a new man is employed ask him for his due book. If he is not a member of Local Union No. 41, I. B. of T., C., W. and H. of A., or he is one month in arrears (and a member of Local Union No. 41, I. B. of T., C., W. and H. of A., in good standing can be had), object to him going to work.

122 SEC. 6. When a member has a complaint he must report to the Steward, whose duty it is to take the member to the Employer, hear both sides of the case, and if the Employer is right tell the member so; if he is not satisfied, send him to the Officials of the Local. If the Employer refuses to comply with the Steward's decision, notify the Officials at once.

SEC. 7. Stewards must not call a strike unless authorized by the Local through its Officers.

SEC. 8. Stewards shall use all their influence to prevent a strike until the Officers have had a chance to adjust the difference.

SEC. 9. See that all members have a copy of the Bylaws.

SEC. 10. See that the Local Secretary-Treasurer has the correct address of each member employed in the stable or garage of which you are Steward.

Adopted by Over-the-Road and City Transfer Drivers,
123 Helpers, Dockmen and Warehousemen, Local Union No. 41,
I. B. of T., C., W. and H. of America.

Bylaw Committee:

W. D. BELT,
JIMMIE HARRIS,
A. D. SMITHERS,
MATT GARWOOD,
JOHN H. ROPP.

Approved by Membership Meetings on October 15th, 1941,
November 9th, 1941, and November 19th, 1941.

Approved by the Joint Council No. 56 this 12th day of
November:

BYLAW COMMITTEE,
By R. R. PRICE,
Recording Secretary.

Approved November 28th, 1941, by International Brotherhood
of Teamsters, Chauffeurs, Warehousemen and Helpers.

THOMAS E. FLYNN,
Acting for General President.

125

THINGS TO BE REMEMBERED

Regular meetings are first and third Wednesdays at 8 p. m. and
second Sunday at 10 a. m.

Dues are payable on or before the first of the month in advance.

Don't let your dues elapse and deprive you from your benefits.

Do not fail to take out Withdrawal Card when leaving craft.

(Continued from p. 58.)

126 seniority is concerned, do you remember when that went
into effect?—A. I remember it going into effect but I don't
remember the date.

Q. It has been several years, I mean four or five years?—A. I
would say it was five or six years, maybe a little bit longer.

Q. You were one of those who opposed the passage of that,
weren't you?—A. Yes, sir.

Q. And this matter was taken up in three of the meetings of
the union and you, among others, contested and opposed that rule
but a majority of those who were present, of those members who

were present at those meetings, voted in favor of the rule?—A. Yes.

Q. Now you, of course, have been a member for many years, almost since the inception of this Local 41, haven't you?—A. Yes, sir.

Q. And you took the oath of membership?—A. Yes, sir.

Q. And agreed to be bound by its constitution and bylaws?—A. That's right.

Q. And do you want to be bound by the constitution and bylaws, isn't that true?—A. That's right.

Q. You have no intention and had no intention when you filed the charge in this case of refraining from any of your union activities?—A. No.

Q. Or refraining from any of the benefits or liabilities that attend membership in this union?—A. No. I thought I was trying to help them make a better union out of it.

Q. Your purpose in filing the charge was to try to get rid of this rule, isn't that true?—A. That is correct.

Q. And since the time that you filed the charge you have decided that the method or procedure that you used was incorrect and that you should go through the union itself to get this rule taken off the books, isn't that right?—A. Well, I finally made up my mind that it would be the best way.

127 Q. Yes. In other words, the thing to do to get rid of what you think is an obnoxious bylaw is to prevail on the rest of the members or a majority of them at least to vote the rule out of existence, isn't that correct?—A. Yes; that is correct.

Q. And so far as you are concerned, this matter that is before the Board here should be dropped and you allowed to proceed through your union and through the democratic processes of the union, isn't that true?—A. I asked for it to be dropped.

Q. You still consider yourself bound by the oath of obligation of the constitution and bylaws of the union?—A. Yes, sir.

Q. And you intend and want to be so bound?—A. Yes, sir.

Q. So the record may be clear on the point, you never saw me before this morning, did you?—A. I never saw you before to my knowledge.

Mr. MANNING. I believe that is all.

Redirect examination by Mr. SCOTT:

Q. Mr. Boston, when you lost your seniority you did not—was your membership in the union forfeited at that time?—A. No; I don't think it was.

Q. And has the union continued to accept dues from you since that time?—A. Yes.

Q. What was the last time you paid your dues?—A. In July, last time I paid them.

Q. Well, how are your dues collected now?—A. By what you call a check-off system.

Q. And are you paid for this month?—A. I am paid up for December.

Q. And the union has been receiving your dues?—A. I haven't got the stamp for December yet but they have already taken it out of my check.

128 Q. And you are not delinquent in dues for any months of this year or past year, are you?—A. I am paid up until the 31st day of December.

Mr. SCOTT. I think that is all.

Mr. MANNING. Nothing further.

Trial Examiner BEAN. Thank you, Mr. Boston.

Witness excused.

Mr. SCOTT. The General Counsel rests.

Mr. MANNING. Well, I move, Mr. Examiner, that the complaint be dismissed on the ground that the charging party has indicated that he desires to withdraw the charge and the complaint, that he feels bound by the oath of obligation of the constitution and bylaws of the respondent union and that he does not desire to refrain from any of his obligations and, on the second ground that the complaint has wholly failed to establish any violation of the National Labor Relations Act and in particular, the charges alleged, that is, violation of Sections 8 (b) (1) and 8 (b) (2) of the Act, and for the reason that assuming all the evidence of the General Counsel to be true, none of these acts established or constitute an unfair labor practice within the meaning of those sections in that they do not encourage or discourage membership in the labor organization and they are nondiscriminatory practices so far as the Act itself is concerned. If anything, they would discourage membership in the Act.

Trial Examiner BEAN. In the union, membership in the union.

Mr. MANNING. Membership in the union, right.

For this reason, there being no union shop clause in existence it is not incumbent upon employees to belong and therefore it would be to their advantage to fail to join and not be affected by the bylaws of the labor organization.

129 Trial Examiner BEAN. Do you wish to be heard, Mr. Scott?

Mr. SCOTT. No.

Trial Examiner BEAN. I will take the motion under consideration.

Mr. MANNING. I would like to examine Mr. Floyd Hayes.

FLOYD R. HAYES, a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MANNING:

Q. Will you state your name?—A. Floyd R. Hayes.

Q. What is your position with the Teamsters Local 41?—A. Secretary-Treasurer.

Q. How long have you been in that position?—A. That particular position, ten years.

Q. How long have you been with the union?—A. Fourteen years.

Q. Since its beginning?—A. Since it was any size. It began in '33 but it didn't grow to any size until '36 when we came into it.

Q. You are familiar, of course, with the bylaws of the local union?—A. Yes.

Q. And in particular with respect to Section 45?—A. Yes.

Q. You are also familiar with the contract which is General Counsel's Exhibit No. 2?—A. Yes.

Q. Referred to as the Central States Area Agreement which covers, among other employees, those employed by Byers Transportation Company?—A. Yes; I am familiar. I was on the negotiating committee of that contract for ten years, since 1940.

130 Q. You helped negotiate the present agreement?—A. Right.

Q. Are you familiar with Section 1, Article 5, in particular the last sentence of that section which reads, "Any controversy over the seniority standing of any employee on this list shall be referred to the union for settlement"?—A. Yes; very familiar with it.

Q. Is it the understanding of the union representatives and yourself that the phrase, "Any controversy" includes instances where employees become delinquent or in arrears in their dues and forfeit their seniority rights under Section 45 of the bylaws?—A. Yes.

Q. Has that bylaw been in effect for several years?—A. This is the second bylaw. In other words, the bylaw has changed according to the international convention. They used to have it every five years and they changed it to four so I think it is going on the eighth or ninth year. It depends on when that law come out. I would have to look at the record.

By Trial Examiner BEAN:

Q. It was in effect last summer, last June?—A. Yes.

By Mr. MANNING:

Q. And you have been in contractual relationship with these employers during all the time that that bylaw has been in effect?—A. Yes.

Q. When I say you, of course I mean the union?—A. Right.

Q. And during all of that period of eight or nine years there have been many instances, have their not, when members have become in arrears in their dues and Section 45 of the bylaws as set-up?—A. Yes.

Q. And during all of that time the employers, carriers, interpreted the contract as you have, that is, in such instances or included in the phrase, "any controversy" mentioned in Section 1 of Article 5?—A. Yes; that is right.

131 Q. Was that discussed in your negotiations of that section of Article 5 when it first went into the contract?—A. Yes, in the discussion where they set it up to start with and they named two or three things how your seniority can be broken. And then over the contract we negotiated on a wide scale and have taken in 12 states in contingency territory, three hundred and some local unions. Then they added the last sentence to take care of the local situation. So far as we are concerned we are in complete agreement on the negotiations.

Q. When you say "we" you mean the employers locally in this region?—A. I mean the employers over the 12 states which these people are a part of. They have their own association. And in the back of the contract the entire negotiating committee were in complete agreement with the meaning of Article 5, Section 1.

By Mr. SCOTT:

Q. On page 43 is that a correct map of the employers that you cover with this?—A. The reason that map is in there, you see that blank line running up through the right-hand side, that is the Mississippi River. That little dotted line following out there on it is 40 miles from the Mississippi River and on the other side, east of this is known as the eastern division which carries a higher rate of pay. Otherwise the contract is in toto.

By Mr. MANNING:

Q. Now, of course, there are local unions covered by this contract who do not have a bylaw similar to Section 45?—A. Lots of them.

Q. There are others that do have that same bylaw?—A. Yes.

Q. And as I understand you, at the time this last sentence, Section 1 of Article 5 was negotiated and placed in the contract, it was to take care of the local situations where some local
132 might have a bylaw or some other situation might exist which affected the carriers and the men and the unions locally but did not affect the entire contract or entire group?—A. Yes; that's right. It's set out so that it can be setup and used locally.

Q. Applied on everybody?—A. In the 12 state and contiguous territory.

Q. In other words, any employee covered by this contract represented by one of these three hundred or so unions that you have spoken of, any such employee's seniority can be broken by discharge, voluntary quitting or more than two year lay-off, isn't that true?—A. Yes; that is right. If we all operated under the international constitution we didn't have individual bylaws, we would be estopped because they all have the same meaning.

Q. But since there were local problems such as this Section 45 of this local and other problems of other locals, this last sentence was added to Section 1?—A. That's right.

Q. And included, I understand you, among the local problems and among the situations which would constitute a controversy over the seniority standing, was this Section 45?—A. Right.

Q. Now, then, calling your attention to Section 4 of Article 5, which is on page 8 of the contract, the union, under that section or subparagraph (a), has the determination of seniority in the event of merger or purchase of lines?—A. That's right. The union or unions. It is also broad unless it can take in more than one.

Q. That is true.

Mr. MANNING. Will you mark that as "Respondent's Exhibit No. 1" for identification?

(Thereupon the document above referred to was marked "Respondent's Exhibit No. 1" for identification.)

133 By Mr. MANNING:

Q. Mr. Hayes, I hand you what has been marked for identification as Respondent's Exhibit No. 1 and ask you whether or not that is the constitution of the International Brotherhood of Teamsters?—A. Yes; that is the constitution and bylaws combined.

Mr. MANNING. I offer the exhibit in evidence.

Mr. SCOTT. No objection.

Trial Examiner BEAN. Without objection it is admitted.

(The document heretofore marked "Respondent's Exhibit No. 1" for identification was received in evidence.)

By Mr. MANNING:

Q. Does that constitution provide a method for members to process grievance against a local union within the structure of the international and its affiliated unions?—A. Yes.

Q. That procedure, as I understand, is set out in Article 18 and in particular Section 3 of Article 18 of the constitution?—A. That is correct.

Q. The constitution further provides in Section 13 of Article 18 that a member is to exhaust his remedies within the union it-

self before proceeding outside of the union to process a grievance?—A. Yes; that is correct.

Mr. MANNING. I believe that is all.

Mr. SCOTT. No cross-examination.

Mr. MANNING. Now, Mr. Examiner, as I stated on the off-the-record-discussion, the respondent union could produce virtually all of the carriers who operate locally here, in fact, probably produce all of them as witnesses and I had in mind producing four or five of such carriers for the purpose of testifying to their understanding and interpretation of Section 1 of Article 5 of the Central States Area Agreement, which is General Counsel's Exhibit No. 2, and if those witnesses did appear they would

Respondent's Exhibit 1

134

ARTICLE XVIII. TRIALS AND APPEALS

TRIALS OF LOCAL OFFICERS AND MEMBERS—PROCEDURE

SECTION 1 (a). A member or officer of a local union, charged with any offense constituting a violation of this Constitution, shall, unless otherwise provided in this Constitution, be tried by the Local Executive Board. If the member proposing the charges is a member of such Board then the president of the local shall appoint a disinterested member as a substitute.

(b) Whenever charges are preferred against any member or officer of a local, the charges shall be filed in writing in duplicate with the secretary of the local union, Joint Council or General Executive Board which is to try the case. No member or officer of a local shall be tried unless he or she shall be served by the secretary, personally or by registered mail, with a written copy of such charges specifying the nature of the offense of which he or she is accused. Thereupon, the accused shall be required to stand trial at the time and place designated, which shall not be less than ten (10) days from the date the charges are served upon the accused. The accused may appear in person, and with witnesses, to answer the charges preferred against him or her. He may select a member of his local to represent him in the presentation of his defense.

(c) If the charges, or any portion thereof, are sustained, then the trial body shall render judgment and impose disciplinary action as provided for in this Constitution. If the charges are not sustained, the same shall be dismissed and the accused re-
135 stored to full rights of membership or office in the local union.

(d) Upon filing of such charges, and if the same are of such magnitude and seriousness as to jeopardize the interests of the local or International, then and in that event the General President, if the matter is brought to his attention, may, if he deems it advisable, immediately suspend such member or officer from membership or office in the local union until a decision has been rendered in the case.

APPEALS OF LOCAL OFFICERS AND MEMBERS

SEC. 2. (a). In the event disciplinary action is taken against the accused, he or she may take an appeal from the decision of the Local Executive Board to the Executive Board of the Joint Council, if one exists, otherwise the appeal shall be taken to the General Executive Board. Appeals from decisions of the Executive Board of Joint Councils may be taken to the General Executive Board. In all matters involving officers of subordinate bodies and individ-

ual members there shall be no further appeal from the decision of the General Executive Board. Where elective officers of the International Union are involved, and as to all other matters not specifically excluded herein, appeals from decisions of the General Executive Board may be taken to the next Convention. All manner of appeals shall be taken within fifteen (15) days from the date the decision is mailed or otherwise transmitted to the interested parties.

(b) The appellant shall mail a written notice of such appeal to the secretary of the body to which the appeal is directed. No specific form or formality shall be required, except that such
136 notice shall clearly state an appeal is being taken from the particular decision rendered in the particular case. Pending any appeal, the decision appealed from shall remain in full force and effect. Appeals shall be heard either on the record made before the trial tribunal or by a retrial, in the discretion of the body hearing the appeal. Decisions on appeals shall be rendered as promptly as possible after the appeal has been heard. The date when an appeal will be considered by the appellate body may be fixed by it, but it shall proceed without unnecessary delay. Notice of the date when the appeal will be heard shall be served personally or by registered mail on the parties interested in the particular case, and such parties may, in the discretion of the appellate body, be accorded the right to appear before the appellate body and present argument on the case.

(c) If a member of the Executive Board of the Joint Council or of the General Executive Board is interested in the case as a party thereto, then the President of the Joint Council or the General President of the International, as the case may be, shall appoint a substitute.

(d) Failure of any interested party in any case to appear before any trial or appellate body at the time and place designated in the notice shall constitute a waiver of appearance and the trial shall proceed or the appeal heard regardless of the absence of such party.

(e) Any party to a case, regardless of whether such party is the accused or not, being aggrieved of a decision rendered in the case shall be entitled to the same rights of appeal as are hereinbefore provided for accused.

137 TRIALS AND APPEALS OF LOCAL UNIONS, OTHER SUBORDINATE BODIES, AND ELECTIVE INTERNATIONAL OFFICERS

SEC. 3. (a) Whenever charges are preferred against a local union or against a Joint Council, or other subordinate body, such charges shall be filed in writing in duplicate with the secretary of

the trial body, and shall be served personally or by registered mail on the secretary-treasurer of the local union or the Joint Council or other subordinate body so charged. If the charges are against the local union the trial shall be by the Executive Board of the Joint Council. If the charges are against a Joint Council or other subordinate body the trial shall be before the General Executive Board.

(b) A local shall be accorded thirty (30) days' time in which to appear for trial and submit its defense. In the case of a Joint Council or other subordinate body the time of trial shall be fixed by the General Executive Board.

(c) In the matter of appeals from decisions affecting local unions not including decisions involving officers or individuals, the same shall be taken to the General Executive Board, and from it to the Convention. In the matter of appeals from decisions affecting Joint Councils, or other subordinate bodies, not including decisions involving officers or members thereof, the same shall be taken to the Convention. In all other respects procedure on appeals shall be the same as provided for in Section 2, this Article.

(d) Trial of elective International officers shall be before the General Executive Board at such time and place as fixed by the General Executive Board. The officer charged shall be found guilty only on a majority vote of the entire General Executive Board. Appeals by such General Officers from decisions of the General Executive Board shall be to the Convention.

(e) Emergency powers provided for in Section 9, this Article, shall apply with the same force and effect to local unions and Joint Councils and other subordinate bodies.

ORIGINAL JURISDICTION OF GENERAL EXECUTIVE BOARD TO TRY
OFFENSES AGAINST INTERNATIONAL UNION

SEC. 4 (a). The General Executive Board shall have jurisdiction to try individual members, local unions, Joint Councils or other subordinate bodies, or International Officers for all offenses committed against the officers of the International Organization or the International Organization.

(b) Charges shall be filed in duplicate in writing with the General Secretary-Treasurer or the General President. A copy of the charges shall be served personally or by registered mail upon the accused, together with notice of the time and place of trial.

(c) If the accused are unable to be present at the meeting of the Board, they may present their case in writing.

GROUNDS FOR CHARGES AGAINST MEMBERS, LOCALS, JOINT COUNCILS
AND OFFICERS

SEC. 5 (a). The basis for charges against members, local unions, Joint Councils or officers, for which he, she or it shall stand trial, shall, among other things, consist of the following:

- (1) Violation of any specific provision of the Constitution.
- (2) Violation of the oath of loyalty to the local and the International.
- 139 (3) Violation of the oath of office.
- (4) Gross disloyalty, or conduct unbecoming a member.
- (5) If an officer, gross inefficiency which shall hinder and impair the interests of the local or of the International.
- (6) Misappropriation.
- (7) Secession, or fostering the same.
- (8) Abuse of fellow members and officers by written or oral communication.
- (9) Abuse of fellow members or officers in the meeting hall.
- (10) Activities which tend to bring the local or the International into disrepute.
- (11) Disobedience to the regulations, rules, mandates and decrees of the local or of the officers of the International.

(b) And for such other acts and conduct which shall be considered inconsistent with the duties, obligations and fealty of a member of a trade union, and for violation of sound trade union principles.

SPECIFIC OFFENSES

SEC. 6. Any member who (1) knowingly goes to work or remains in the employment of any person, firm or corporation, whose men are on strike or locked out, unless he has permission of the International, the Joint Council or his local union, may be tried by the Executive Board of his local union, or (2) knowingly gives or attempts to give directly or indirectly, any information to any employer on an unfair list or whose men are on strike or locked out, or whose men are trying to secure an agreement or an improvement in their working conditions or whose men are trying to prevent an increase in hours of labor or a decrease in wages, for the purpose of assisting such employer, or for any gain or
140 promise of gain, or (3) knowingly goes to work or remains in the employment of any person, firm or corporation on an unfair list of the International without permission from the International Brotherhood, the Joint Council or his local union, may be tried in the manner provided for the trial of other offenses.

REFUSAL TO RETURN BOOKS

SEC. 7. Any member who (1) wrongfully takes or retains any money, books, papers or any other property belonging to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, any Joint Council or local union; or (2) who mutilates, erases, destroys or in any way injures any books, bills, receipts, vouchers, or other property of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, any Joint Council or local union, may be tried in the manner provided for the trial of other offenses.

DECISIONS AND PENALTIES

SEC. 8 (a). Decisions and penalties imposed upon the persons, officers, Locals, Joint Councils or other subordinate bodies found guilty of charges may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period or commands to do or perform, or refrain from doing or performing, specified acts. If the penalty is by way of fine then the same must be paid, pending an appeal if one is taken unless the General President waives the same, a local union ordered to reinstate a member or perform an act other than the payment of a fine must comply therewith as a condition precedent to taking an appeal unless the General President or the General Executive Board suspends such order pending the appeal. If the fine
141 is against a member or officer of a local union, assessed by the local union, it shall be paid into the Treasury of the local union. If a fine is assessed against a Local by a Joint Council the payment shall be to the Treasury of the Joint Council.

(b) If the fine is assessed where the General Executive Board has original jurisdiction, it shall be paid to the Treasury of the International.

(c) When such penalty consists only of a fine and an appeal is taken, such fine shall be deposited as above provided; thereupon such member, officer or Local shall be permitted to continue in the Union with full rights and privileges in accordance with the laws of the International. If on appeal the decision is reversed and the fine disallowed, then the same shall be returned to the party depositing the same. Whenever a decision is handed down by any trial or appellate body and an appeal is taken, such decision shall stand and remain in full force and effect until reversed by a higher body.

(d) In the event of noncompliance with the decision handed down by a trial or appellate body, the member, officer, local, or Joint Council shall stand suspended from all privileges of the International Brotherhood until the provisions of the decision

have been complied with. If, however, the decision carries with it an order of expulsion, then such order of expulsion shall immediately take effect.

(e) Any member or local that is tried by the General Executive Board cannot be tried for the same offense by a local or Joint Council.

(f) The General Executive Board may send a case back to the Joint Council, the local union, or other hearing body or officer for further hearing, production of additional testimony, or for further consideration with or without such further hearing.

142 EMERGENCY POWER IN GENERAL PRESIDENT TO CONDUCT A TRIAL WHEN WELFARE OF ORGANIZATION DEMANDS

SEC. 9. (a). Whenever charges involving a member or members, officer or officers, local union or Joint Council create a situation imminently dangerous to the welfare of a local union, Joint Council, or the International, the General President is empowered, in his discretion, to assume original jurisdiction in such matter, regardless of the fact that charges have been filed with another body and are pending. Under such circumstances, the General President may hold a hearing upon giving not less than forty-eight (48) hours notice to the persons charged to appear before him at a place and time designated by him. He may then proceed to hear and try the matter and render judgment in accordance with the fact and circumstances presented to him. When the General President has so acted, an appeal shall lie from his decision to the General Executive Board, and from the General Executive Board to the Convention in the same manner as is provided for appeals in other cases. Pending appeal from the General President's action, his decision shall stand and be enforced.

(b) When the General President deems it necessary to exercise the foregoing emergency power, he may deputize a representative to act for him in such matter. Such representative shall have the same powers as the General President as herein provided; however, when a trial shall be conducted by a representative of the General President, such representative shall make his recommendations to the General President, orally or in writing, and the decision in the case shall be made by the General President himself.

143 CHARGES NOT PREFERRED IN GOOD FAITH

SEC. 10. If charges are preferred against members or officers of local unions and such charges are not sustained, and the trial body is convinced that the same were not brought in good faith or were actuated by malice, the trial body or the appellate body may

impose such penalty by the way of punishment as in its judgment is deemed proper under the circumstances.

REFUSAL OF LOCAL TO TRY MEMBER

SEC. 11. Any local union refusing to try its members when charges have been preferred by another local union, for any cause whatsoever, the local union preferring the charges may then bring the charge before the Executive Board of the Joint Council, where one exists, for trial and decision in the same manner as provided for the conduct of other trials before the Local Executive Board. If no Joint Council exists, then the matter shall come within the jurisdiction of the General Executive Board.

REVOCATION OF MEMBERSHIP ON BEING FOUND GUILTY OF CRIME

SEC. 12. (a). When a member is found guilty of the commission of a crime or serious wrongdoing, or pleads guilty to the commission of a crime or serious wrongdoing, against the local union or against the community, and which crime or act of serious wrongdoing tends to bring dishonor upon the local union or the International Organization, it shall be the duty of the local union to proceed to revoke the membership of such member. Likewise, whenever a member of a local union has engaged in what is commonly termed racketeering, and he is found guilty thereof, 144 thereby bringing dishonor upon the local union or upon the International Organization, it shall be the duty of the local union to proceed in the manner provided in Article XVIII, Sec. 1, to revoke the membership of such member.

(b) Under the circumstances referred to in the foregoing paragraph, the secretary-treasurer of the local union shall refuse to accept dues from any person so removed from membership. It shall be mandatory upon the Local Executive Board to order the name of such member stricken from the rolls and to notify all local unions in the district, the Joint Council and the International, of its action and the cause therefor.

(c) In the event a local union fails to carry out the foregoing provision, then the General President, when the matter is brought to his attention, shall have the power, in his discretion, to proceed to revoke or order the revocation of the membership of such member.

(d) Any individual whose membership is hereafter revoked in accordance with the provisions of this section may subsequently be reinstated to membership; such reinstatement shall be subject to the approval of the local of which he was a member, the involved Joint Council, and the General Executive Board.

EXHAUSTION OF REMEDIES

SEC. 13 (a). Every member or officer of a local union, or other subordinate bodies or General Officer of the International, against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered, shall be obliged to exhaust all remedies provided for in this Constitution and by the International before resorting to any other court or tribunal.

145 (b) Where a member, local union or other subordinate body, before or following exhaustion of all remedies provided for within the International Union, resorts to a court of law and loses his or its cause therein, all costs and expenses incurred by the International Union shall be assessed against such individual, local union or other subordinate body, in the nature of a fine, subject to all penalties applicable where fines remain unpaid.

Where such court action is by an individual or by a local union or other subordinate body against a local union or other subordinate body, the foregoing provision in respect to the payment of costs and expenses shall be applicable in favor of the local union or other subordinate body proceeded against in court.

ARTICLE XIX. DISSOLUTION

SECTION 1. No local union can dissolve while there are seven (7) dissenting members; no Joint Council can dissolve while there are two (2) dissenting local unions; nor can this International dissolve while there are seven (7) dissenting locals.

ARTICLE XX. LABOR DAY

SECTION 1. We recognize the first Monday in September as Labor Day, except in states where another day is provided by law, and call upon all local unions to observe the same. It is advisable for local unions to unite and march under one banner in cities where there is more than one local union and each local union can make such rules and regulations requiring their members to observe the day, as best adapted to their locality.

146 testify that they have always construed the phrase "any controversy over the seniority standing of any employee" as that phrase is used in Section 1 of Article 5 of the contract, to include instances where employees are reduced in seniority standing because of Section 45 of the bylaws of Local 41. They would testify that that understanding was arrived at through negotiation of the contract and that they have in the past followed the practice of regarding such instances as one of such controversies and have allowed the union, Local 41, to determine the seniority standing of members when they became in arrears. And I understand that the general counsel will stipulate that if those witnesses were called they would so testify.

Mr. SCOTT. I am willing to make that stipulation. I would like to ask you, Mr. Manning, you are not contending at any time the union deviated from the provisions of the bylaws in interpreting seniority, are you?

Mr. MANNING. I don't understand what you mean by deviating.

Mr. SCOTT. Well, I meant by this, your bylaws provide that they lose their seniority if they are in arrears. Any member of the union one month in arrears should forfeit all seniority rights?

Mr. MANNING. Well, all accrued rights. They apparently retain them on the seniority list and if that is losing seniority, as you say, well, that's what they do.

Mr. SCOTT. I want to have it clear for the record. You are not contending that any of these witnesses would testify that the union under the same circumstances with Boston, had done any different with other employees, that is what you mean?

Mr. MANNING. No; I think that is true, the union in all instances where an employee gets in arrears in his dues, that
147 is, a member of the union gets in arrears in his dues, the bylaws are placed in operation and the seniority standing of the member is reduced.

Mr. SCOTT. It is forfeited.

Mr. MANNING. Forfeited to this extent that assuming that there were two employees, for illustration, who had failed to pay June dues, one of them was in, say tenth place on the seniority list and the other was in twentieth place. The one who was in tenth place would go to the next to the bottom name on the list and the one who was in twentieth place would go to the bottom of the seniority list, so that in effect it would not be a complete forfeiture of all seniority rights. That is the way it operates, isn't that correct, Mr. Hayes?

Mr. HAYES. That is correct. If I might make one little short statement in there.

Trial Examiner BEAN. You want to say something to clarify the situation?

Mr. HAYES. Say you had a large barn where you had a hundred road drivers working there. The turnover was very large and you had ten men at the bottom of the list that hadn't worked 30 days yet under the time that is specified to get in the union. The man that didn't pay his dues would be placed ahead of those ten. He wouldn't go below those that are classified extra men. He would just go down to the bottom of the regular list. He wouldn't forfeit those other rights that started down below the last men. Over here in this subcase if he went to the bottom of the list, I would have to check the record to see which is correct, it is because they didn't have any turnover and because it was the last man had been there more than 30 days on the list.

Mr. SCOTT. Mr. Hayes, do you ever put anybody on the seniority list who are not members of your Local 41?

Mr. MANNING. Well, now, of course the contract sets up, 148 Mr. Scott, and then automatically go on the seniority list at the end of 30 days whether they are a member of the union or not. The contract doesn't provide that they have to be members of the union to go on the seniority list.

Mr. SCOTT. It is a fact you don't put them on the seniority list unless they are members.

Mr. MANNING. Unless they are members?

Mr. SCOTT. Unless they are members.

Mr. MANNING. No.

Mr. HAYES. That was agreed to in the negotiations of the contract. It is set up there where that works just the same as the by-laws because the man works the 31 days he is automatically put on the list according to the agreement we have reached in the negotiations.

Trial Examiner BEAN. And with the same token if he does not work over 30 days he is not on the list.

Mr. HAYES. Right. He would be classified as an extra man and discharged without further recourse. All he would request is a letter.

Mr. SCOTT. What have you been doing, Mr. Hayes, in regard to enforcing the provisions as to union shop as set forth in Article 2, page 3?

Mr. MANNING. Just a minute. I object to that.

Mr. SCOTT. General Counsel's Exhibit No. 2.

Mr. MANNING. I object to that as entirely irrelevant and immaterial to the issues here. There isn't any charge of any illegal union shop agreement. The contract is specific as to the exemptions of this union from the union shop clause contained in the contract. We have admitted that there has been no U. A. election and there is no evidence of any enforcement of an illegal union

shop agreement. I see no reason why there should be any such evidence.

Trial Examiner BEAN. I think I will exclude it.

149 Mr. SCOTT. That is all.

Mr. MANNING. That is all.

I renew my motion to dismiss the complaint for the reasons stated at the close of the general counsel's case.

Trial Examiner BEAN. Well, I will have to consider this case. It is one that is relatively novel, not entirely novel, and I will take your motion under advisement and act on it and give an intermediate report.

If there are no further questions of the witness he is excused.
Witness excused.

CLIF. LANGSDALE,

JOHN J. MANNING,

922 Scarritt Building, Kansas City 6-E, Mo.,

Attorneys for Respondent.

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Mr. D. P. Findling and Mr. A. Norman Somers as Counsel for Petitioner.)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14457

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ETC.

The Clerk will enter our appearance as Counsel for the Petitioner.

A. NORMAN SOMERS,
Associate General Counsel,
D. P. FINDLING,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D. C.

(Endorsed): Filed in U. S. Court of Appeals, September 28, 1951.

(Appearance of Miss Elizabeth W. Weston as Counsel for Petitioner.)

The Clerk will enter my appearance as Counsel for the Petitioner.

ELIZABETH W. WESTON,
Attorney.

(Endorsed): Filed in U. S. Court of Appeals, March 3, 1952.

(Appearance of Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the Respondent.

CLIF LANGSDALE,
JOHN J. MANNING,
922 Scarritt Bldg.,
Kansas City, Mo.

(Endorsed:) Filed in U. S. Court of Appeals, September 22, 1951.

ORDER OF SUBMISSION

September Term, 1951. Tuesday, March 4, 1952

This matter having been called for hearing in its regular order, argument was commenced by Mr. John J. Manning for respondent, continued by Miss Elizabeth W. Weston, Attorney, National Labor Relations Board, for petitioner, and concluded by Mr. John J. Manning for respondent.

Thereupon, this matter was submitted to the Court on the petition to enforce order of the National Labor Relations Board, and the Answer thereto, and on the pleadings and proceedings before said Board and the briefs of counsel filed herein, with leave to petitioner to file Supplemental Memorandum in seven days.

OPINION

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,457

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION No. 41, A.F.L., RESPONDENT

Petition to Enforce Order of National Labor Relations Board

(April 29, 1952)

Elizabeth W. Weston, Attorney, National Labor Relations Board (George J. Bott, General Counsel, David P. Findling, Associate General Counsel, A. Norman Somers, Assistant General Counsel, and John E. Jay, Attorney, National Labor Relations Board, were with her on the brief) for Petitioner.

John J. Manning (Clif. Langsdale was with him on the brief) for Respondent.

Before GARDNER, *Chief Judge*, and WOODROUGH and THOMAS, *Circuit Judges*

THOMAS, *Circuit Judge*:

On September 20, 1951, the National Labor Relations Board filed its petition in this court pursuant to § 10(e) of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C., Supp. IV, §§ 151 et seq., for enforcement of its order of June 26, 1951, against the above named respond-

ent. This court has jurisdiction of the proceeding, the unfair labor practices alleged having occurred at the place of business of Byers Transportation Company, Inc., located in Kansas City, Missouri, within this circuit.

The proceeding was commenced by a charge filed with the Board by one Frank Boston, an employee of the Transportation Company. He alleged that the respondent was engaging in an unfair labor practice affecting commerce within the meaning of the Act, in that, about July 1, 1950, the respondent caused the Employer Company to terminate his seniority, causing him to lose wages for reasons other than his failure to tender the periodic dues and fees uniformly required as a condition of acquiring or retaining membership in Local Union No. 41, A.F.L. Based upon the charge a complaint was filed against the respondent, a hearing was had before a Trial Examiner, whose intermediate report was largely adopted by the Board with one member dissenting.

The Board found that the employer, Byers Transportation Company, is engaged as a common carrier in motor transportation, whose operations are subject to regulation by the Interstate Commerce Commission; that Frank Boston is one of its employees; that the employer and the respondent had entered into an agreement in force at all times pertinent to the issues; and that no union-shop agreement existed between them.

The evidence showed that the contract contained a clause making union membership a condition of employment, but that the union did not obtain the statutory authorization necessary to validate it so that the clause never became operative.

Boston failed to pay his June, 1950, union dues until July 5, 1950. Because of his failure to pay said dues for June on or before July 2d, as provided by a bylaw of respondent, he lost his seniority rights; and since such dues were not paid until July 5th, the respondent, on July 15, 1950, requested the employer to reduce his seniority from the 18th place on the list to the 54th, or bottom of the list. This was done, and as a consequence Boston lost assignments for two trips for which he otherwise would potentially have received pay of \$28.05 on each trip.

Upon these facts the Board found that respondent caused the employer to discriminate against Boston within the meaning of § 8 (a) (3) of the Act, thereby itself violating § 8(b) (2), and that respondent also restrained and coerced Boston in the exercise of his statutory rights in violation of § 8(b) (1) (A) of the Act.¹

¹ So far as pertinent the Act provides:

“§ 8(a) It shall be an unfair labor practice for an employer—
“(3) by discrimination in regard to hire or tenure of employ-

1. To cease and desist from

(c) Restraining employees of the company in the exercise of the rights guaranteed them in § 7 of the Act.

2. Affirmatively

(c) Post notice that it will do none of the things which it is ordered not to do.

“§ 8(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

"(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."

"§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title."

The respondent contends that there is no basis in the evidence for the findings of the Board; whereas the Board insists that its findings and order are supported by the facts.

The agreement between the Transportation Company and the union established a seniority system under which the employees bid for truck driving assignments according to their relative places on the seniority list, and they were subject to layoff inversely to their standing. New employees after a 30-day trial were placed at the bottom of the list. The agreement provided, also, that the seniority could be broken or lost only by discharge, voluntary quitting, or more than a two-year layoff. The company submitted a list of its employees to the union with the anniversary dates of their employment, and the agreement further provided:

" . . . A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employees on this list shall be referred to the Union for settlement."

One of the bylaws of the union provides: "Sec. 45. Any member, under contract, one month in arrears for dues shall forfeit all seniority rights . . . (a) . . . On the second day of the second month a member becomes in arrears with his dues."

Thus the union was able under its agreement with the Transportation Company to call on the company as employer of its members to punish members delinquent in the payment of their dues in violation of said bylaws; and, as the Board found, thus, to discriminate against an employee "in regard to hire or tenure of employment or a condition of employment . . ."

On this point the Board said: "We agree with the Trial Examiner that the employer, by reducing Boston's seniority for being delinquent in the payment of his union dues, discriminated against Boston and that such discrimination would constitute a violation of Section 8(a) (3) of the Act, where, as in this case, the Respondent had not obtained a union-shop contract or a certification pursuant to Section 9(e) of the Act . . . For, in so doing an employer would be strengthening the position of such union contrary to the well-established principle that an employer's acceptance of the determination of a labor organization as to who shall be permitted to work for it is violative of Section 8(a) (3) where no lawful contractual obligation for such action exists."

The evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to "tenure . . . or condition of employment." This was a violation of § 8(b) (2) of the Act.

The question confronting us, therefore, is whether there is substantial evidence to support the finding that such discrimination

would or did "encourage or discourage membership in any labor organization" in violation of § 8(a)(3) of the Act. Discrimination alone is not sufficient.

The respondent argues that there is no basis for the Board's finding, in that there is no evidence in the record to sustain the finding, citing *Labor Board v. Reliable Newspaper Delivery, Inc.*, 3 Cir., 187 F. 2d 547.

In addition to the facts stated above Boston testified that he had been employed as a truck driver for a little more than four years and that during all of that time he had been a member of Local 41 and is still a member thereof; that he failed to pay his dues for the month of June, 1950, until July 5th following, and that he thereby violated a union bylaw. On cross-examination he testified that he had requested the Regional Director to permit him to withdraw the charge he had filed and that he was denied that privilege. He was a member of the union at the time the bylaw, Section 45 supra, under which he lost his seniority, was passed; and he filed the charges against the union to get rid of that rule.

The rule to be applied by this court in determining the validity of the Board's finding is set out in § 10(e) of the National Labor Relations Act as amended in 1947 by the Labor Management Relations Act, known as the Taft-Hartley Act (61 Stat. 148, 29 U.S.C., Supp. III, § 160(e)). This section reads: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." See *Universal Camera Corp. v. Labor Board*, 340 U.S. 474; *Labor Board v. Pittsburgh Steamship Co.*, 340 U.S. 498.

Having considered the record as a whole we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston did or would encourage or discourage membership in any labor organization. The testimony of Boston refutes such a conclusion. Theoretically such an act might have such an effect. But in this case we find no substantial evidence that it did or would have such effect. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. Quoted in *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 477. It "must do more than create a suspicion of the existence of a fact to be established." *Labor Board v. Columbian Enameling & Stamping Co.*, 305 U.S. 292, 300.

The meaning of the statute in its application to different circumstances may be debatable. Clearly § 8(a)(3) may be read thus: It shall be an unfair labor practice for an employer to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment.

In this instance the discrimination occurred when the employer, caused by the act of the Union in violation of § 8(b)(2), reduced Boston's seniority from the 16th to the 54th place on the list of employees.

The testimony of Boston, however, shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union. The question then is, Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by "suspicion" and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it.

The petition of the Board for a decree enforcing its order must, therefore, be and it is denied.

DECREE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14457

September Term, 1951. Tuesday, April 29, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L., RESPONDENT

Petition to Enforce Order of National Labor Relations Board

This cause came on to be heard on the petition of the National Labor Relations Board for a decree enforcing order entered by said Board on June 26, 1951, against respondent, the answer of the respondent to the petition for enforcement and the pleadings and proceedings before said Board, and was argued by counsel.

On consideration Whereof, It is now here Ordered, Adjudged and Decreed by this Court that the petition of the National Labor Relations Board in this cause for a decree enforcing order entered by said Board on June 26, 1951, be, and the same is hereby, denied.

April 29, 1952.

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 14,457

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

The National Labor Relations Board respectfully petitions this Court for a rehearing of the Court's decision entered on April 29, 1952 insofar as it fails to pass upon the Board's conclusion that the conduct of respondent Union, apart from any question of its legality under Section 8 (b) (2) of the Act, constituted an independent violation of Section 8 (b) (1) (A). The Board respectfully submits that the Court inadvertently overlooked this separate and distinct unfair labor practice finding, which alone justifies all the provisions of the Board's order except paragraph 1 (b) thereof.

In its opinion the Court found, in agreement with the Board, that respondent Union "was able under its agreement with the Transportation Company to call on the company as employer of its members to punish members delinquent in the payment of their dues * * " (slip opinion p. 5), although the union-shop clause in the respondent's contract with the employer was never validated and "never became operative" (sl. op., p. 3); that "the evidence here abundantly supports the finding * * * that the respondent caused the employer to discriminate against Boston" (sl. op., p. 6); and that such "discrimination occurred when the employer, caused by the act of the union in violation of Section 8 (b) (2), reduced Boston's seniority [as a penalty for delinquency in the payment of Union dues]" (sl. op., p. 8).

Upon these facts, the Board concluded that respondent Union had violated Section 8 (b) (1) (A) of the Act, inasmuch as the job discrimination which the Union practiced against Boston constituted restraint or coercion of employees (by a form of economic reprisal not privileged under the *proviso* to Section 8 (b) (1) (A)), in the exercise of a right (e.g., to "refrain" from assisting the Union by paying dues or otherwise) which is guaranteed in Section 7 of the Act (R. 20, 32, 33-34, 36). The Court did not discuss these

legal conclusions in its opinion; it only rejected the Board's additional conclusion that the discrimination in question tended to "encourage" Union "membership" within the meaning of Section 8 (a) (3) of the Act, so as to make the Union's conduct illegal under Section 8 (b) (2) (sl. op., pp. 7, 8).¹ In denying enforcement of the Board's order for this one reason, we respectfully submit, the Court erred, apparently overlooking the independent character of the two unfair labor practices found by the Board to have been committed by the respondent in this case. In this connection, the Board desires to point out that the element of encouragement of union "membership," which the Court found lacking here, is *not an essential element of the unfair labor practice defined in Section 8 (b) (1) (A) of the Act*. That Section, without reference to any employer violation of Section 8 (a) (3), broadly proscribes union restraint or coercion of employees in the exercise of the right to engage in, or abstain from, union and concerted activity which is guaranteed in Section 7.

For the reasons discussed at pages 27-31 of the Board's main brief,² the Board's conclusion that respondent Union's conduct in this case violated Section 8 (b) (1) (A)—whether or not it also violated Section 8 (b) (2)—is fully warranted by the fact findings, summarized above, which the Court has adopted in its opinion. Both the essential elements of an 8 (b) (1) (A) violation are present: (1) Under Section 7 of the Act, Boston had a right not to pay his Union dues, just as any employee is entitled to "refrain" from any and all forms of union activity and assistance to labor organizations. And (2) it is settled law that to "discrimi-

¹ The Board respectfully notes its disagreement with the Court's holding that the record does not contain sufficient evidence to sustain the Board's inference that the job discrimination involved in this case "did or would encourage * * * membership" in the Union (sl. op., pp. 7-8). The Court's determination, in agreement with the Board, that the Union was able to, and did, "call on the company as employer of its members to punish members delinquent in the payment of their dues" (sl. op., p. 5), we submit, is sufficient to establish that Boston and the other Union members were encouraged to *pay their dues* promptly, and thereby encouraged to maintain "membership" in the Union, in violation of Section 8(a) (3) and (b) (2). However, we do not ask for rehearing on this point inasmuch as we have nothing to add to what we said on it in our brief and argument.

² See also, the supplemental memorandum on the legislative history of the *proviso* to Section 8 (b) (1) (A) which was filed by the Board, pursuant to leave granted by the Court during the oral argument, in March 1952.

nate against an employee" (sl. op., p. 5), as here, in regard to a term or condition of his employment,³ is to "restrain or coerce" employees within the meaning of both Section 8 (a) (1) and Section 8 (b) (1) of the Act (see cases cited at p. 27, note 24 of the Board's brief).

Furthermore, the Board's order in this case (R. 21-23), save only for paragraph 1 (b) (R. 21), is adequately supported by the separate and independent finding that respondent Union committed an unfair labor practice under Section 8 (b) (1) (A). See *Gullett Gin Co. v. N.L.R.B.*, 179 F. 2d 499 (C.A. 5) reversed on other grounds, 340 U.S. 361, where the court, although refusing to find that an employer's discrimination against employees violated Section 8 (a) (3) of the Act, sustained the Board's finding that the employer had violated Section 8 (a) (1) and enforced those provisions of the Board's order which required the employer to reinstate the employees discriminated against and reimburse them for their loss of pay. See also *N.L.R.B. v. Smith Victory Corp.*, 190 F. 2d 56 (C.A. 2), enforcing 90 NLRB 2089; *N.L.R.B. v. Vail Mfg. Co.*, 158 F. 2d 663, 667 (C.A. 7); cf. *Eclipse Lumber Co.*, 95 NLRB No. 59 (28 LRRM 1329, 1333).

For these reasons, it is submitted that this petition for rehearing be granted, and that upon such rehearing the Court enter a decree enforcing the Board's order in all respects except paragraph 1 (b).

Respectfully submitted,

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ELIZABETH W. WESTON,
JOHN E. JAY,
Attorneys,
National Labor Relations Board.

MAY 1952.

³ As explained at pp. 29-31 of the Board's brief, the *proviso* to Section 8 (b) (1) (A), upon which the Union relied as a defense, permits a labor organization to "prescribe" discriminatory rules "with respect to the acquisition or retention of membership therein." The proviso does not apply to the Union's conduct in this case, however, for that conduct involved discrimination with regard to conditions of *employment*, not "with respect to the acquisition or retention of membership" in the Union.

Certificate of Counsel

Comes now A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and is believed to be meritorious.

A. NORMAN SOMERS,
National Labor Relations Board.

WASHINGTON, D. C., MAY , 1952.

(Endorsed): Filed in U. S. Court of Appeals, May 12, 1952.

ORDER DENYING PETITION OF PETITIONER FOR REHEARING

September Term, 1951. Monday, June 2, 1952

Petition for Rehearing filed by Petitioner in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

JUNE 2, 1952.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed record, consisting of pleadings before the National Labor Relations Board, petition of the National Labor Relations Board for enforcement of its Order, and answer of respondent to petition for enforcement, and portions of record printed as an appendix to brief of respondent, on which the case of National Labor Relations Board, Petitioner, vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A.F.L., Respondent, No. 14457, was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in said cause in said Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States.

I do further certify that on the 13th day of June, A. D. 1952, a certified copy of the Decree of said Court of Appeals entered on

April 29, 1952, was transmitted to the National Labor Relations Board.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri on the 12th day of August, A. D. 1952.

E. E. KOCH,
*Clerk of the United States Court of Appeals
for the Eighth Circuit.*

[SEAL.]

162

Supreme Court of the United States

No. 301, October Term, 1952

[Title omitted.]

Order allowing certiorari

Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is assigned for argument immediately following No. 230, **Radio Officer's Union, etc. vs. National Labor Relations Board.**

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
I. The facts	4
II. The Board's decision	6
III. The Court's decision	7
Specification of errors to be urged	8
Reasons for granting the writ	8
Conclusion	17
Appendix	18

CITATIONS

Cases:

<i>Bethlehem Shipbuilding Corp. v. National Labor Relations Board</i> , 114 F. 2d 930	13
<i>Colonie Fibre Co. v. National Labor Relations Board</i> , 163 F. 2d 65	10
<i>Paul Cusano v. National Labor Relations Board</i> , 190 F. 2d 898	10
<i>Firestone Tire & Rubber Co.</i> , 93 NLRB 981	6, 10
<i>General Motors Corp.</i> , 59 NLRB 1143, enforced per curiam, 150 F. 2d 201	12
<i>National Labor Relations Board v. J. G. Boswell Company</i> , 136 F. 2d 585	12
<i>National Labor Relations Board v. Cities Service Oil Company</i> , 129 F. 2d 933	13
<i>National Labor Relations Board v. Donnelly Garment Company</i> , 330 U. S. 219	13
<i>National Labor Relations Board v. Electric Auto-Lite Co., etc.</i> , 196 F. 2d 500, pending on petitions for writs of certiorari, Nos. 124 and 140, this Term	10
<i>National Labor Relations Board v. Engelhorn & Sons</i> , 134 F. 2d 553	12
<i>National Labor Relations Board v. Gaynor News Co., Inc.</i> , 30 LRRM 2340 (C. A. 2, June 24, 1952)	12
<i>National Labor Relations Board v. Radio Officers Union, etc.</i> , 196 F. 2d 960, pending on petition for writ of certiorari No. 230, this Term	9, 11, 14, 17
<i>National Labor Relations Board v. Reliable Newspaper Delivery, Inc.</i> , 187 F. 2d 547	11

(1)

Cases—Continued

	Page
<i>National Labor Relations Board v. Walt Disney Productions, Inc.</i> , 146 F. 2d 44, certiorari denied, 324 U. S. 877	10, 12, 13
<i>Radio Officers Union</i> , 93 NLRB 1523	9
<i>Republic Aviation Corporation v. National Labor Relations Board, and National Labor Relations Board v. LeTourneau Company of Georgia</i> , 324 U. S. 793	13
<i>Union Starch and Refining Company v. National Labor Relations Board</i> , 186 F. 2d 1008, certiorari denied, 342 U. S. 815	10

Statutes:

National Labor Relations Act, 1935 (49 Stat. 449, 29 U.S.C. 151, <i>et seq.</i>):	
Section 8 (3)	6, 17
National Labor Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, <i>et seq.</i> , and P. L. 189, 82d Cong., 1st Sess.):	
Sec. 7	18
Sec. 8(a) (3)	6, 7, 8, 9, 14, 17, 18
Sec. 8(b) (1)	6, 20
Sec. 8(b) (2)	6, 7, 15, 20
Sec. 9(e) (1)	20
Sec. 10(a)	21
Sec. 10(c)	22
Sec. 10(e)	22

Miscellaneous:

93 Cong. Rec. 3837	16
93 Cong. Rec. 4135	16
93 Cong. Rec. 4138	16
93 Cong. Rec. 4192-4193	15, 16
93 Cong. Rec. 4432	16
93 Cong. Rec. 4886	16
93 Cong. Rec. 5014	16
93 Cong. Rec. 6443	15
H. R. 3020, 80th Cong., 1st Sess.	15
H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 44	16
Sen. Rept. No. 105, 80th Cong., 1st Sess., pp. 2-3, 6-7, 21-22	15, 16
S. 1126, 80th Cong., 1st Sess.	15

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. — **301**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF
AMERICA, OVER-THE-ROAD AND CITY TRANSFER
DRIVERS, HELPERS, DOCKMEN AND WAREHOUSE-
MEN, LOCAL UNION No. 41, A. F. L.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit entered on April 29, 1952 (R.A. 36ff.),¹

¹ For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the volume containing the pleadings and the Board's decision and order as presented to the court below, herein designated "R.," and the appendix to respondent's brief in the court below,

which denied enforcement of an order issued by the Board against International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A.F.L.

OPINIONS BELOW

The opinion of the court below (R.A. 36-41) is reported at 196 F. 2d 1. The findings of fact, conclusions of law, and order of the Board (R. 17-39) are reported at 94 NLRB 1494.

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. A. 41). A petition for rehearing filed by the Board was denied on June 2, 1952 (R. A. 45). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether denial of employment to a union member, because he has failed or refused to perform an obligation of union membership, constitutes discrimination which encourages or discourages

herein designated "R.A.". Occasional references to the exhibits introduced in evidence by the General Counsel at the hearing before the trial examiner, which are stapled to the appendix to respondent's brief, are designated "Exh." The proceedings in the court below are bound with, and paginated continuously from, the end of the appendix to respondent's brief. Wherever, in a series of references, a semicolon appears, references preceding the semicolon are to the Board's findings; those following refer to the supporting evidence.

"membership" in a labor organization within the meaning of Section 8 (a) (3) of the Act, regardless of the lack of proof that the denial of employment "encouraged" (or "discouraged") the employee immediately affected, or any other employee to acquire or retain "membership" in the Union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.* and P.L. 189, 82d Cong., 1st Sess.), are set forth in the Appendix, *infra*, pp. 18-23.

STATEMENT

After the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on June 26, 1951, issued its decision in which it held that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, A.F.L. (herein called the Union) had violated Section 8 (b) (2) of the Act. This section makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of sub-section [8] (a) (3)"; and Section 8 (a) (3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire * * * or any term or condition of employment to encourage or discourage membership in any labor organization." The pertinent facts, as

found by the Board, and accepted by the court below, may be summarized as follows:

I. The Facts

From November 16, 1949, and throughout the period involved in this proceeding, Byers Transportation Company (herein called the Company) was a party to an agreement, known as the "Central States Area Over-the-Road Agreement"² with the Union, the exclusive bargaining representative of the Company's employees (R. 31; R.A. 3-4, 26, Exh. 2, p. 1). The agreement, governing working conditions on all over-the-road operations of the Company, contained a clause making union membership a condition of employment, but this clause never became operative because the Union did not obtain the requisite statutory authorization (R. 18, 31; 7, R. A. 2-3, 33).

The agreement also established a seniority system under which the employees bid for truck driving assignments in order of their relative places on the seniority list (R. 31; R. A. 6-7, 21). The agreement provided (R. 31; 7, R. A. 2-3, 8-9, 12-14, 27, 29, Exh. 2, p. 7):

* * * A list of employees arranged in the order of their seniority shall be posted in a conspicuous place at their place of employment. Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement.

² This agreement, according to respondent's witness, has been executed with employers by more than 300 locals of the Union in twelve different States (R. A. 28-29).

Under authority of this clause, and after receiving the dates of initial employment from the Company, the Union compiled the seniority list from time to time and transmitted it to the Company for posting (R. A. 4, 5-6, 8, 13-14).

With the knowledge and assent of the Company, the Union made it a practice to reduce the seniority rank of its members who were delinquent in the payment of their dues, pursuant to Section 45 of its by-laws which provided that "Any member, under contract, one month in arrears for dues shall forfeit all seniority rights * * * (a) * * * On the second day of the second month a member becomes in arrears in dues" (R. 31; R. A. 6, 8-9, 11-14, 18-19, 27-28, 30-32, Exh. 3, pp. 18-19). In addition, Section 44 of the by-laws prescribed the penalty of automatic suspension from membership for being three months in arrears in dues, but preserved the Union's "jurisdiction over any member * * * until such time as he is released, either by Withdrawal Card, expulsion or death" (R. 7, R. A. 2-3, Exh. 3, p. 18).

For over four years, James Frank Boston, a union member, was employed as a truck driver by the Company (R. 31; 6, 10, R. A. 3, 17). By the end of June 1950, he had attained the 18th highest position on the seniority list (R. 31; R.A. 17, 18). Boston failed to pay his union dues for the month of June until July 5, 1950, when he paid his dues for both June and July (R. 31; R. A. 19). About ten days later, on about July 15, the Union compiled a new seniority list, reducing Boston's stand-

ing from 18th to 54th, the bottom position on the list, and, following the usual practice, submitted the new list to the Company which posted it (R. 31; R. A. 5, 6, 15, 18, 19-20, 21-22). As a consequence of his reduced seniority, Boston was deprived of truck driving assignments which he would otherwise have obtained and for which he would have received compensation (R. 31; R. A. 15-16, 20, 21).

II. The Board's Decision

The Board found that the reduction of Boston's seniority for being delinquent in the payment of his Union dues constituted discrimination which necessarily tended to encourage the faithful performance of membership obligations by union members and thus tended "to encourage membership" within the meaning of Section 8 (a) (3) of the Act (R. 18, note 1, 34).³ Accordingly, since the Union attempted to and did cause this unlawful discrimination against Boston, and acted without the sanction of a union-shop contract, the Board concluded that the Union violated Section 8 (b) (2) of the Act and, by the same conduct, also violated Section 8 (b) (1) (A), since it coerced an employee in the exercise of his statutory right to

³ By reference to its holding in *Firestone Tire and Rubber Company*, 93 NLRB 981, 983-984, a case involving almost identical facts, the Board explained that the term "membership," as used in Section 8 (a) (3) and in Section 8 (3) of the Wagner Act, had always been construed as synonymous with "membership in good standing," a phrase which, in turn, encompasses the timely payment of membership dues.

refrain from supporting the Union or other concerted activity (R. 18, 20, 33, 34). Member Murdock dissented (R. 23-26).

III. The Court's Decision

The court below denied enforcement of the Board's order (R. A. 41). Agreeing with the Board "that the respondent [Union] caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure * * * or condition of employment'" within the meaning of Sections 8 (a) (3) and 8 (b) (2), the court further conceded that "theoretically" the act of discrimination, *i.e.*, reducing Boston's seniority as a penalty for his default in the payment of union dues, "might have [the] effect" of encouraging or discouraging membership in the Union (R. A. 39, 40). The court held, however, that this discrimination did not constitute a violation of Section 8 (a) (3) because there was no evidence that it encouraged or discouraged any employee's "adhesion to membership" in the Union (R. A. 41). In this connection, the court pointed out that Boston was a member of the Union prior to the discrimination and retained his status as a member thereafter (R. A. 40); that Boston testified that the discrimination neither encouraged nor discouraged him to remain in the Union (*ibid.*); and that there was no evidence beyond mere "'suspicion' and speculation" to show that the discriminatory practice had such effect upon other employees

(R. A. 41).⁴ Accordingly, the court concluded that, since an essential element of the employer's violation of Section 8 (a) (3) was not established, the Union did not violate Section 8 (b) (2) by causing the discrimination against Boston.⁵

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that discrimination against a union member because he failed to perform an obligation imposed by the union upon its members to regulate its internal affairs does not, without more, constitute "discrimination * * * to encourage or discourage membership in any labor organization" so as to fall within the proscription of Section 8 (a) (3) of the Act.

2. In failing to issue a decree enforcing the order of the Board.

REASONS FOR GRANTING THE WRIT

The holding of the court below that, absent proof of encouragement or discouragement of union

⁴ The court below expressed doubt that this consideration was even material, stating (R. A. 41): "Would the act of the union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence substantial or otherwise to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by 'suspicion' and speculation. There is no evidence in the record either substantial or in the nature of a scintilla to support it."

⁵ The court did not pass upon the Board's conclusion that the Union's conduct also violated Section 8 (b) (1) (A) of the Act (R. A. 37, 41, 42-45). However, the Board does not seek review on the basis of this omission.

membership, Section 8 (a) (3) does not prohibit the denial of employment to a union member because of his failure to perform an obligation of membership is in conflict with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board v. The Radio Officers' Union, etc.*, 196 F. 2d 960, now pending on petition for a writ of certiorari, No. 230, this Term.

1. In both the *Radio Officers* case, *supra*, and the instant case, the particular union involved caused a union member to lose employment because of his infraction of union rules. In the *Radio Officers* case the court approved the holding of the Board that the employer, in penalizing the employee for his failure to carry out the obligations of union membership, had encouraged "membership" in the Union, in the sense that his action was "aimed at compelling obedience to union rules" (93 NLRB 1523, at 1527; cf. p. 6, note 3, *supra*), notwithstanding the absence of proof that any employee was thereby induced to join or remain in the union as a formally enrolled member. The court below reached the opposite conclusion on substantially similar facts.

The crux of this conflict is the proper interpretation of the phrase "membership in any labor organization" in Section 8 (a) (3)—the phrase which defines the scope of the statutory ban on discrimination in employment. The court below restricts the key word "membership" to "adhesion to membership" (R. A. 41), that is, remaining on a

Union's membership roster (or, presumably, joining a Union). The Board believes that this concept is unduly restrictive, and reads the term "membership" in its statutory context as synonymous with "good standing" in a Union.⁶

In a number of cases, usually without discussion, the courts have indicated that the prohibition against discrimination tending to encourage or discourage "membership" had a broader content than that given it by the opinion below. *National Labor Relations Board v. Walt Disney Productions, Inc.*, 146 F. 2d 44, 49 (C.A. 9), certiorari denied, 324 U.S. 877 (all employees in union under closed-shop contract, but discharge might cause them to forego all active part in union affairs, thereby in effect relinquishing their right to membership in a labor organization); *Paul Cusano v. National Labor Relations Board*, 190 F. 2d 898, 901-903 (C.A. 3) (discharge for making allegedly false statement in course of a report to fellow employees); *National Labor Relations Board v. Electric Auto-Lite Co.*, 196 F. 2d 500 (C.A. 6), petitions for certiorari pending, Nos. 124 and 140, this Term (discharge for not attending union meetings); *Union Starch and Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1011 (C.A. 7), certiorari denied, 342 U.S. 815, (failure of conscientious objector to take union oath); *Colonic Fibre Co. v. National Labor Relations Board*, 163 F. 2d 65 (C.A. 2) (discharge for non-payment of dues).

⁶ See the *Firestone* case, *supra*, note 3.

The decision in the *Radio Officers* case, following the line of cases cited above, treats the term "membership" as used in Section 8 (a) (3) and 8 (b) (2) as embracing the obligations of membership, and holds that to encourage the fulfillment of those obligations is to encourage "membership" within the meaning of the Act. The contrary view of the court below gives rise to a square conflict on a question of fundamental importance in the administration of the Act. We accordingly submit that the issue should be decided by this Court.

2. In holding that, to find a violation of Sections 8 (a) (3) and 8 (b) (2), the Board must have proof that the discrimination "did or would" encourage or discourage employees to become or remain union members (R. A. 40),⁷ the decision of the court below is again in conflict with numerous decisions of the several courts of appeals, including the decision in the *Radio Officers* case. In that case, as here, the denial of employment was a disciplinary measure, designed to punish a default-

⁷ We believe that this ruling, although it was the stated ground of the decision below, is a consequence of the court's mistaken concept of "membership" discussed above. With one debatable exception, no court has ever before called for proof of "encouragement" or "discouragement" in a case where it found that there was "discrimination," within the meaning of Section 8 (a) (3), and the discrimination was based upon membership or non-membership in a union. The one exception is *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547, 551-552 (C. A. 3). In that case, however, the Third Circuit's basic holding was that there was no "discrimination" in the statutory sense, and its statement that, in any event, requisite proof of "encouragement" was wanting, was only an alternative ground of decision, if not *dicta*. Compare note 9, p. 12, *infra*, and our Memorandum in the *Radio Officers* case, No. 230, this Term, note 9, p. 14.

ing (though unexpelled) union member for his violation of a union rule, and there, too, the record contained no evidence disclosing the reaction of other employees, either members or non-members of the union. The Second Circuit, however, applied the well-settled rule that discrimination in employment falls within the proscription in Section 8 (a) (3) if it has an "inferable" (the *Walt Disney* case, *supra*, 146 F. 2d, at 49) or "inherent" (*National Labor Relations Board v. Gaynor News Company, Inc.*, 30 LRRM 2340 (C. A. 2, June 24, 1952)) tendency to encourage or discourage union membership. Under this view, which the Board believes correct,⁸ Section 8 (a) (3) does not, any more than the other unfair labor practice provisions of the Act, "require proof that the proscribed conduct had its desired effect." *National Labor Relations Board v. Engelhorn & Sons*, 134 F. 2d 553, 557 (C.A. 3).⁹ See also *National Labor Relations Board v. J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C. A. 9), and cases there cited; *National Labor Relations Board v. Walt Disney Productions, Inc.*, 146 F. 2d 44, 49 (C.A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board v. Cities Service Oil*

⁸ In *General Motors Corp.*, 59 NLRB 1143, 1145, enforced per curiam, 150 F. 2d 201 (C. A. 3), the Board held that discriminatory treatment of employees fell under the ban of Section 8 (3) of the Wagner Act because it "was of such a character as to have a *natural tendency* to discourage union membership." (Emphasis supplied.)

⁹ Insofar as the Court of Appeals for the Third Circuit repudiated this principle in the *Reliable Newspaper* case, *supra*, the Board believes that decision to be erroneous and in conflict with the Second Circuit's decisions in *Radio Officers and Gaynor News*, *supra*.

Co., 129 F. 2d 933, 937 (C. A. 2). Furthermore, if there is "rationality" in the Board's inference that the proscribed result—encouragement or discouragement of union membership, in a Section 8 (a) (3) case—flowed from the "evidential facts," that inference is binding upon the reviewing court. *Republic Aviation Corp. v. National Labor Relations Board* and *National Labor Relations Board v. Le-Tourneau Company of Georgia*, 324 U. S. 793, 800, 804-805. The inference is not destroyed by the testimony of a single employee as to his own subjective reaction to the unfair labor practice.¹⁰ For this reason, we believe, the court below was plainly in error in relying, as it appears to have done, upon the testimony of employee Boston (R. A. 40).

Under this analysis, the only question before the court below, and before the Second Circuit in the *Radio Officers* case, was whether the Board could reasonably infer that discrimination against a union member because of his default in the performance of an intra-union obligation has a *tendency* to encourage membership in the Union. If the concept of "membership" expounded above be accepted, the answer to this question is self-evident. In the present case, for instance, it cannot be denied that the discrimination against Boston must have "encouraged" Union members to pay their dues promptly, thus maintaining their "membership" in good standing. But even if we adopt the narrow

¹⁰ See *National Labor Relations Board v. Donnelly Garment Company*, 330 U. S. 219, 229, 231, quoting with approval Judge Magruder's opinion in *Bethlehem Shipbuilding Corp. v. National Labor Relations Board*, 114 F. 2d 930, 937 (C.A. 1).

“adhesion” concept of the court below, the conclusion is the same. Discrimination in employment caused by a union for its internal disciplinary purposes may well serve to attract non-members to the union, as well as to maintain the good standing of the union’s present constituents. For, as the Court of Appeals for the Second Circuit observed in the *Radio Officers* case, such discrimination “display[s] to all non-members the union’s power and the strong measure[s] it was prepared to take to protect union members.” (196 F. 2d 960, at 965). Yet, discounting these considerations as “theoretical” (R. A. 40), the court below searched the record for “substantial evidence” of the tendency or actual effect of the discriminatory practice here involved. (*ibid.*) This approach is in conflict with the decisions of the other courts of appeals cited *supra*, pp. 12-13, and raises an issue going to the heart of Section 8 (a) (3) which should be settled by this Court.

3. In permitting the union, in the absence of a union-shop agreement under the proviso to Section 8 (a) (3), to compel the demotion of a union member for non-payment of dues, the court below has misread the text of the statute and nullified the intent of Congress as clearly expressed in the legislative history of the 1947 amendments. The proviso to Section 8 (a) (3) permits “discrimination against an employee for nonmembership in a labor organization” only where both of two conditions are met: (1) the existence of a valid union-shop agreement, and (2) a reasonable belief on the part

of the employer that nonmembership was based upon the employee's failure to pay the union dues or initiation fees. Correspondingly, Section 8 (b) (2) prohibits a labor organization from causing or attempting to cause an employer

to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.¹¹

These provisions clearly imply, if they do not state in so many words, that discrimination based on non-payment of union dues is categorically forbidden, save only where the elaborately circumscribed conditions of exemption defined in the Section 8 (a) (3) proviso are met. Those conditions were not met in the present case, as the court below recognized (R. A. 37). Yet, *without* a valid union-security agreement, the Union here resorted to job dis-

¹¹ The quoted language, with an added qualification not here material, is the same as the original Senate version of Section 8 (b) (2). S. 1126, 80th Cong., 1st Sess., and H.R. 3020 as passed by the Senate. It was specifically designed to apply only in a case where a valid union-shop contract is in effect, and to limit the grounds upon which a union might lawfully induce an employer to discriminate pursuant to such a contract. See Sen. Rept. No. 105, 80th Cong., 1st Sess., p. 21; 93 Cong. Rec. 4192-4193. The Conference Committee expanded Section 8 (b) (2) by inserting the phrase "to discriminate against an employee in violation of subsection (a) (3), or" in order to give the same protection to employees not covered by union-shop agreements. See Senator Taft's statement at 93 Cong. Rec. 6443.

crimination as a means of insuring the collection of its membership dues.

In sanctioning the Union's practice, the decision below opens the door to widespread evasion of the intent of Congress in enacting the 1947 amendments to the Act. If a union, by the simple expedient of keeping a delinquent or recalcitrant member on its rolls, and not pretending to invoke a union-shop agreement, can lawfully reduce an employee's seniority as a penalty for non-payment of dues, as in this case, it may by the same token cause the discharge of its "members" for such membership offenses as dual union activity, campaigning in a union election against an incumbent union officer, testifying against a fellow union member, refusing to contribute to a union's political fund, or refusing to purchase tickets in a union raffle. Yet each and every one of these practices was specifically denounced by sponsors of the 1947 amendments, and characterized as an example of the intolerable abuses of the closed-shop system.¹² Because of such abuses Congress determined that the institution of compulsory union membership had to be drastically curtailed.¹³ The decision below, however, attaching an unforeseen and restrictive meaning to the key word "membership," immunizes the very abuses which Congress sought to correct by outlawing the closed shop, and would permit discrimination in employment which, so far as Section 8 (3) was con-

¹² See Sen. Rept. No. 105, 80th Cong., 1st Sess., pp. 21-22; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 44; 93 Cong. Rec. 3837, 4135, 4138, 4193, 4432, 4886, 5014.

¹³ Sen. Rept. No. 105, 80th Cong., 1st Sess., pp. 2-3, 6-7.

cerned, was not even lawful under the Wagner Act.¹⁴ We submit that the issue raised by this apparent frustration of congressional policy should be reviewed by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

✓ ROBERT L. STERN,
Acting Solicitor General.

✓ GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

AUGUST 1952.

¹⁴ Absent a valid closed-shop contract which authorized the particular compulsory membership practice in question, Section 8 (3) of the Wagner Act, in the very same language as Section 8 (a) (3) of the amended Act, banned all discrimination in employment "to encourage * * * membership" in a union. See the *Radio Officers* case, *supra*, and cases cited therein.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), as further amended by Public Law 189, October 22, 1951 (82nd Cong., 1st Sess.), are as follows:¹⁵

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8 (a). It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United

¹⁵ Provisions which were eliminated by P.L. 189 are enclosed in brackets; provisions which were added by that amendment are in italics.

States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f),(g),(h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:* *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds

for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(e) [(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition

alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) * * *]

1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such

person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
I. The Board's findings of fact	3
II. The Board's conclusions and order	7
III. The Court's decision	8
Specification of errors to be urged	9
Summary of Argument	9
Argument	12
A union, by causing reduction of an employee's seniority for delinquency in dues payment, in the absence of a valid union security agreement, violates Section 8 (b) (2) and (1) (A) of the Act	12
A. The statutory scheme divests both employers and unions of control over employment directed to advancing or retarding an employee's participation or non-participation in union activity except to permit compulsory dues payment pursuant to a valid union security agreement	13
B. Congress sought to eliminate union abuses of control over employment in the field of union activity by permitting the exercise of control only through a valid union security agreement and only for the purpose of compelling dues payment	16
C. Without a valid union security agreement, reduction in an employee's seniority for dues delinquency is discrimination which encourages "membership" within the meaning of Section 8 (a) (3)	26
1. Membership embraces membership in good standing, which is plainly encouraged by discrimination for dues delinquency	28
2. Membership, even in the restricted sense of enrollment in the union, is encouraged by discrimination for dues delinquency	36
3. Discrimination is outlawed if it tends to encourage or discourage union membership and reduction in seniority for dues delinquency has an encouraging tendency	37
D. A union, by causing reduction in an employee's seniority for dues delinquency, is guilty of	

Argument—Continued

	restraint and coercion of the employee in exercising his right to refrain from assisting a union within the meaning of Section 8 (b) (1) (A) of the Act	43
Conclusion		45
Appendix		46

CITATIONS

Cases:

<i>Ansley Radio Corporation</i> , 18 NLRB 1028	31
<i>Bethlehem Shipbuilding Corp. v. National Labor Relations Board</i> , 114 F. 2d 930	40
<i>Bethlehem Steel Corporation</i> , 1 War Lab. Rep. 325	30
<i>Colgate-Palmolive-Peet Company v. National Labor Relations Board</i> , 70 NLRB 1202, enforced, 171 F. 2d 956, reversed, 338 U. S. 355	18, 28, 31
<i>Elastic Stop Nut Co. v. National Labor Relations Board</i> , 142 F. 2d 371, certiorari denied, 323 U. S. 722	41
<i>John Engelhorn & Sons</i> , 42 NLRB 866, enforced, 134 F. 2d 553	30, 32, 41, 42
<i>Federal Shipbuilding & Drydock Co.</i> , 1 War Lab. Rep. 140	29
<i>Firestone Tire & Rubber Company</i> , 93 NLRB 981	34
<i>General Motors Corp.</i> , 59 NLRB 1143, enforced with modification, 150 F. 2d 201	38
<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U. S. 490	37
<i>Humble Oil & Refining Co. v. National Labor Relations Board</i> , 113 F. 2d 85	41
<i>International Association of Machinists v. National Labor Relations Board</i> , 311 U. S. 72	37
<i>Joy Silk Mills, Inc. v. National Labor Relations Board</i> , 185 F. 2d 732, certiorari denied, 341 U. S. 914	41
<i>Lincoln Federal Labor Union v. Northwestern Iron & Metal Company</i> , 335 U. S. 525	18
<i>Modern Motors, Inc. v. National Labor Relations Board</i> , 198 F. 2d 925	42
<i>National Electric Products Corp.</i> , 3 NLRB 475	32
<i>National Labor Relations Board v. A. S. Abell Co.</i> , 97 F. 2d 951	41
<i>National Labor Relations Board v. American National Insurance Co.</i> , 343 U. S. 395	30
<i>National Labor Relations Board v. J. G. Boswell & Company</i> , 136 F. 2d 585	38
<i>National Labor Relations Board v. Brezner Tanning Company</i> , 141 F. 2d 62	38, 41
<i>National Labor Relations Board v. Cities Service Oil Company</i> , 129 F. 2d 933	38

III

Cases—Continued

	Page
<i>National Labor Relations Board v. Donnelly Garment Co.</i> , 330 U. S. 219	40
<i>National Labor Relations Board v. Eclipse Lumber Com- pany</i> , 31 LRRM 2065 (C. A. 9, November 12, 1952) ..	26
<i>National Labor Relations Board v. Electric Auto-Lite Company</i> , 196 F. 2d 500, enforcing 92 NLRB 1073 ..	26
<i>National Labor Relations Board v. Electric Vacuum Cleaner Company</i> , 315 U.S. 685	28
<i>National Labor Relations Board v. Federal Engineering Company</i> , 153 F. 2d 233, enforcing 60 NLRB 592	31
<i>National Labor Relations Board v. Ford Brothers</i> , 170 F. 2d 735	41
<i>National Labor Relations Board v. Gaynor News Co.</i> , 197 F. 2d 719, certiorari pending, No. 371, this Term	38
<i>National Labor Relations Board v. Illinois Tool Works</i> , 153 F. 2d 811	41, 42
<i>National Labor Relations Board v. Link-Belt Company</i> , 311 U. S. 584	40
<i>National Labor Relations Board v. Vail Manufacturing Company</i> , 158 F. 2d 664, certiorari denied, 331 U. S. 835	38
<i>National Labor Relations Board v. Walt Disney Pro- ductions</i> , 146 F. 2d 44, enforcing 48 NLRB 892	31, 38
<i>Order of Railroad Telegraphers v. Railway Express Agency</i> , 321 U. S. 342	30
<i>Phelps-Dodge Corp. v. National Labor Relations Board</i> , 313 U. S. 177	35
<i>Premo Pharmaceutical Laboratories, Inc.</i> , 42 NLRB 1086, enforced, 136 F. 2d 85	30
<i>Radio Officers' Union of the Commercial Telegraphers Union v. National Labor Relations Board</i> , No. 230, this Term	29
<i>Republic Aviation Corporation v. National Labor Rela- tions Board</i> , 324 U. S. 793	39
<i>Sperry Gyroscope Company, Inc. v. National Labor Rela- tions Board</i> , 129 F. 2d 922, enforcing 36 NLRB 1349 ..	32
<i>Tappan Store Company</i> , 66 NLRB 759, enforced, 174 F. 2d 1007	30, 32
<i>Thomas v. Collins</i> , 323 U. S. 516	37
<i>Union Starch & Refining Company v. National Labor Re- lations Board</i> , 186 F. 2d 1008, certiorari denied, 342 U. S. 815	23, 25
<i>Universal Camera Corporation v. National Labor Rela- tions Board</i> , 340 U. S. 474	39
<i>Wallace Corporation v. National Labor Relations Board</i> , 323 U. S. 248	18
<i>Western Cartridge Company v. National Labor Relations Board</i> , 134 F. 2d 240, certiorari denied, 320 U. S. 746	41

IV

Statutes:

	Page
National Labor Relations Act (Act of July, 1935, 49 Stat. 449, 29 U.S.C., 151, <i>et seq.</i>):	
Section 8 (3)	15, 30, 31, 32, 33, 47
National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Supp. V, 151, <i>et seq.</i>)	2
Section 7	13, 14, 44, 46
Section 8 (a) (1)	14, 46
Section 8 (a) (3)	10, 14, 27, 43, 46
Section 8 (a) (3) (A)	15, 47
Section 8 (a) (3) (B)	15, 47
Section 8 (b) (1) (A)	11, 16, 43, 44, 48
Section 8 (b) (2)	11, 16, 43, 44, 48
Section 9 (e) (1)	48
Section 9 (f) (5)	35
Section 10 (a)	49
Section 10 (c)	49
Section 10 (e)	50

Miscellaneous:

<i>The Closed Shop & Union Security</i> , Economic Brief of the American Federation of Labor submitted in <i>Lincoln Federal Labor Union v. North-Western Iron & Metal Co.</i> , 335 U. S. 525	18
93 Cong. Rec. 3837	19, 21
93 Cong. Rec. 4032	22
93 Cong. Rec. 4135	19, 20
93 Cong. Rec. 4191-92	20, 22
93 Cong. Rec. 4193	19, 20, 24
93 Cong. Rec. 4271-72	23, 24
93 Cong. Rec. 4432	19, 20
93 Cong. Rec. 4886	19
93 Cong. Rec. 4887	21
93 Cong. Rec. 6296	22
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, 46	19, 23
H. R. 3020, 80th Cong., 1st Sess., April 18, 1947, Sec. 8 (e) (6), in 1 Leg. Hist. 158, 181	23
H. R. 3020, 80th Cong., 1st Sess., May 13, 1947, Secs. 8 (a) (3) and 8 (b) (2), in 1 Leg. Hist. 237-238, 239-240	24
H. Rep. No. 1147, 74th Cong., 1st Sess., 21	37
H. Rep. No. 245, 80th Cong., 1st Sess., 32, 34	18, 23
H. Min. Rep. No. 245, 80th Cong., 1st Sess., 80	22
S. Rep. No. 573, 74th Cong., 1st Sess., 11	33
S. Rep. No. 105, 80th Cong., 1st Sess., 6, 7, 20, 21-22	19, 20, 24
S. Min. Rep. No. 105, 80th Cong., 1st Sess., 9	22
S. Rep. No. 986, pt. 3, 80th Cong., 2nd Sess., 52	22

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 301

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF
AMERICA, OVER-THE-ROAD AND CITY TRANSFER
DRIVERS, HELPERS, DOCKMEN AND WAREHOUSE-
MEN, LOCAL UNION No. 41, A. F. L.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 90-95) is reported at 196 F. 2d 1. The findings of fact, conclusions of law, and order of the Board (R. 13-30) are reported at 94 NLRB 1494.

(1)

JURISDICTION

The judgment of the court below was entered on April 29, 1952 (R. 95). The Board's petition for rehearing was denied on June 2, 1952 (R. 99). The petition for a writ of certiorari, filed on August 28, 1952, was granted on October 20, 1952 (R. 101). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether denial of employment to a union member, because he has failed or refused to perform an obligation of union membership, constitutes discrimination which encourages or discourages "membership" in a labor organization within the meaning of Section 8 (a) (3) of the Act, regardless of the lack of proof that the denial of employment "encouraged" (or "discouraged") the employee immediately affected, or any other employee, to acquire or retain "membership" in the Union. Otherwise stated, the question is whether it is an unfair labor practice, within the meaning of Section 8 (b) (2) and (1) (A) of the National Labor Relations Act, for a labor organization to cause the reduction of an employee's seniority standing because of the employee's delinquency in the payment of dues to the labor organization where no valid union security agreement is in effect.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136 and 65

Stat. 601, 29 U.S.C. Supp. V, 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 46-51.

STATEMENT

Upon the basis of a charge filed by Frank Boston (R. 2-3), an employee of the Byers Transportation Company, a complaint was issued alleging that, in violation of Section 8 (b) (2) and (1) (A) of the Act, the respondent Union had caused the Company to discriminate against Boston by reducing his seniority standing because of Boston's delinquency in paying his dues to the Union (R. 4-6). The findings of fact pertinent to this complaint, which are undisputed, may be summarized as follows:

I. The Board's Findings of Fact

The Union, as the exclusive bargaining representative of the teamsters in the Company's employ, and the Company were parties to a collective bargaining agreement, known as the "Central States Area Over-the-Road Agreement."¹ This agreement governed working conditions on all over-the-road operations of the Company. It contained a clause making union membership in good standing a condition of employment, but this clause was to become effective only after the Union received the statutory authorization necessary to validate such a provision (R. 14, 15, n. 4, 24; 5, 35, 36, 38-39). Since the Union did not obtain such authorization (R. 14, 24; 5, 35, 87-88), this clause never became

¹ This agreement has been executed with employers by more than 300 locals of the Union in 12 different states (R. 75).

operative. The agreement further provided that where "this clause may not be validly applied, the employer agrees to recommend to all employees that they become members and maintain such membership during the life of this Agreement, to refer new employees to the union representative, and to recommend to delinquent members that they pay their dues since they are receiving the benefits of the contract" (R. 15, n. 4; 39).

The agreement established a seniority system which governed the order of truck-driving assignments and lay-offs (R. 24; 41, 47, 53, 57). Employees received priority in assignment to available work over those below them on the seniority list, were not subject to lay-off until those beneath them were separated, and were accorded priority according to seniority in bidding for better jobs (*ibid.*). New employees hired by the Company, after a 30-day trial period, were placed at the foot of the list, and could improve their standing only as senior employees were either removed from the list or reduced in their position on it (R. 39, 41, 47, 51-53, 86-87).²

The agreement provided that "Any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement" (R. 24; 41, 51-52, 74-76, 29). The Union

² The agreement provided that "Seniority shall be broken only by discharge, voluntary quit, or more than a two-year lay-off" (R. 41). As construed, to have seniority "broken" meant that the employee was removed from the seniority list altogether; it did not embrace altering an employee's position on the list (R. 48).

had "sole control over the employees' seniority", and the Company operated "according to the published seniority list" furnished by the Union (R. 51). From time to time, after receiving from the Company the initial dates of employment of newly-hired teamsters, the Union would compile a seniority list and transmit it to the Company for posting (R. 36, 46, 52).

Section 45 of the Union's by-laws, as it related to seniority, provided that "Any member, under contract, one month in arrears for dues shall forfeit all seniority rights * * * [o]n the second day of the second month a member becomes in arrears in dues" (R. 24; 65). According to the uniform interpretation of this clause, union dues were payable on the first day of each month, and a member became "in arrears for dues" on the second day of the following month (R. 24; 55-56). Thus a member who failed to pay June dues until after July 1, was "in arrears" (*ibid.*).

Section 42 of the Union's by-laws provided that "To be in continuous good standing, a member must pay his dues on or before the first of the month, in advance" (R. 65).³ Section 44 of the Union's by-laws provided that any member "Three (3) months in arrears for dues shall stand suspended," but it stated also that the Union retained "jurisdiction over any member * * * until such time as he is

³ In addition, the Union's by-laws (Sec. 5, Advice to Stewards) instructed the Union's stewards that if a member "in arrears" in dues applied for employment, and another member "in good standing [could] be had," the steward was to "object" to the delinquent member's "going to work" (R. 70).

released, either by Withdrawal Card, Transfer Card, expulsion or death" (*ibid.*).

The Union's position under the collective bargaining agreement as the sole arbiter of controversies over seniority standing was construed to include the authority to reduce a member's seniority because of dues delinquency as provided in the Union's by-law (R. 50, 74). With the knowledge and assent of the Company, it was the Union's practice to enforce the payment of dues on time through this by-law, and to this end the Union reduced the seniority of union members delinquent in their payment of dues (R. 24; 74-75, 49, 50-52, 46-47, 48, 77-86 (omitting intervening exhibit)).

For over four years, Frank Boston was employed as a truck driver by the Company (R. 24; 54). During the entire period, he was a member of the Union and, by the end of June 1950, had reached the 18th position on the seniority list (R. 24; 54-55). However, Boston did not pay his June union dues until July 5, 1950, when he paid his dues for both June and July (R. 24; 55-56). On July 15, the Union compiled a new seniority list, and reduced Boston's standing from 18th to 54th, the bottom position on the list (R. 24; 55-56, 53, 46). The Union submitted the new list to the Company and the Company posted it (R. 24; 46). As a consequence of his reduced seniority, Boston was deprived of truck-driving assignments which he would otherwise have obtained and for which he would have received compensation (R. 24; 57, 53).

After Boston's seniority had been reduced, he filed an unfair labor practice charge, his purpose being "to try to get rid of this rule" providing for loss of seniority because of dues delinquency, whose original adoption he had opposed, and thereby "to help * * * make a better union out of it" (R. 72).

II. The Board's Conclusions and Order

The Board found that the Union had violated Section 8 (b) (2) of the Act by causing a reduction in Boston's seniority because of his delinquency in the payment of his dues (R. 14-15, 25-27). The Board held that, "absent a valid contractual union security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues * * *" (R. 14). The Board observed that the discrimination against Boston had the "effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in" (R. 27). The Board also held that, in violation of Section 8 (b) (1) (A) of the Act, the Union's reduction of

Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization (R. 26, 15).

The Board entered an order requiring the Union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the Company that the Union withdraws its request for the reduction of Boston's seniority and that it requests the Company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance (R. 16-17).

III. The Court's Decision

The Board's petition to enforce its order was denied by the court below (R. 31-33, 90-95). The court agreed that the Union had "caused or attempted to cause the employer to discriminate against Boston," but, holding that "Discrimination alone is not sufficient," it stated that the question was whether "there is substantial evidence to support the finding that such discrimination would or did 'encourage or discourage membership in any labor organization' * * *" (R. 93-94). Noting that Boston was a member of the Union from the inception of his employment with the Company and is still a member (R. 94), the court below concluded that the reduction in his seniority "neither encouraged nor discouraged his adhesion to membership" in the Union (R. 95). The court stated further that, assuming the effect on other employees of the discrimination against Boston was relevant,

there was no evidence to support a conclusion that the membership of other employees in the Union was affected (R. 95). The court concluded that the Union had not violated Section 8 (b) (2) of the Act; it did not advert to the Board's ~~companion~~ holding that the Union's conduct violated Section 8 (b) (1) (A) of the Act.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that discrimination against a union member because he failed to perform an obligation imposed by the union upon its members to regulate its internal affairs does not, without more, constitute "discrimination * * * to encourage or discourage membership in any labor organization" within the proscription of Section 8 (a) (3) of the Act.
2. In failing to issue a decree enforcing the order of the Board.

SUMMARY OF ARGUMENT

The essence of the statutory scheme is to divest both employers and unions of any control over employment when utilized to advance or retard an employee's exercise of the right to participate in or to forego union activity. The single limitation placed on an employee's freedom in this respect is that pursuant to a valid union security agreement the employee may be compelled to pay union dues and initiation fees. By no other means, and for no other purpose, may a union exercise discriminatory control over employment based on an

employee's failure to adhere to membership standards.

Despite its manifest incompatibility with the statutory scheme, the conclusion of the court below is that a union may cause a reduction in an employee's seniority for delinquency in dues payment without the sanction of a valid union security agreement. That result is reached by reasoning that Section 8 (a) (3) of the Act prohibits discrimination only if it encourages or discourages "membership" in any labor organization and that the evidence in this case fails to establish that any employee was induced to join or withdraw from the union as a result of the discrimination practiced.

The court's basic error lies in its misconception of the meaning of "membership." That term embraces membership in good standing in addition to enrollment in the union. This was its settled meaning under the Wagner Act, confirmed by contractual practice, trade union usage, and common understanding. An employee who is delinquent in the payment of his dues defaults in the performance of a membership obligation and thereby fails to maintain his membership in good standing. Hence, to reduce an employee's seniority for dues delinquency palpably encourages his membership in good standing.

Under the Wagner Act, discrimination in employment to compel the payment of dues—and thereby to encourage membership in good standing—could only be effected through the sanction

of a valid union security agreement. Plainly the amendments to the Act, with their far greater restrictions on a union's discriminatory control over employment, contemplated no less.

In any event, even if membership means only enrollment in a union, compulsory dues payment tangibly encourages the acquisition and retention of membership by employees. Guaranteed revenue makes for greater organizational strength, itself an attraction to membership; and a union's capacity to impair employment in order to compel dues payment evidences its power as an organization in which membership is to be embraced in order that its opposition be avoided.

Under either view of the meaning of membership—whether it is restricted to enrollment or extends to good standing status as well—any discrimination is outlawed which *tends* to encourage or discourage membership. The tendency may reasonably be inferred from the character of the discrimination without other evidence of its existence. And so long as the tendency exists, it is immaterial whether its reasonably anticipated effect actually materializes. In this case the reduction in seniority for dues delinquency meets these standards; the Union's conduct, therefore, violates Section 8 (b) (2) of the Act.

The Union's conduct also violates Section 8 (b) (1) (A) of the Act. For the discrimination practiced is restraint and coercion of an employee in the exercise of his right to refrain from assisting a labor organization.

ARGUMENT

A Union, by Causing Reduction of an Employee's Seniority for Delinquency in Dues Payment, in the Absence of a Valid Union Security Agreement, Violates Section 8(b)(2) and (1)(A) of the Act

The court of appeals has held that, even in the absence of a valid union security agreement, a labor organization may cause a reduction in an employee's seniority for delinquency in the payment of union dues unless there is a showing that the consequence of the discrimination is to encourage or discourage his or any other employee's "adhesion to membership" in the union. We shall show (1) that this conclusion is precluded by the Act's guarantee that no employee may be compelled to pay union dues except in conformity with a valid union security agreement; (2) that the interpretation of the Act which underlies the court's conclusion invites the same abuses of union power over employment which induced Congress to limit the enforcement of a union security agreement to compelling only the payment of union dues; (3) that the court misconceives "membership" to mean only enrollment in a union, and fails to discern that it extends to "membership in good standing," a status which a member maintains by the performance of union obligations, of which timely payment of dues is an indispensable part; (4) that reduction in an employee's seniority for delinquency in paying dues obviously encourages his membership in good standing; (5) that even if membership means only enrollment in a union, the court fails adequately to evaluate the influence on

enlisting and maintaining membership which is exerted by compelling prompt payment of dues; and (6) that under either meaning of membership, the discrimination need only *tend* to encourage or discourage membership, and it is immaterial whether the effect has actually manifested itself.

A. THE STATUTORY SCHEME DIVESTS BOTH EMPLOYERS AND UNIONS OF CONTROL OVER EMPLOYMENT DIRECTED TO ADVANCING OR RETARDING AN EMPLOYEE'S PARTICIPATION OR NON-PARTICIPATION IN UNION ACTIVITY EXCEPT TO PERMIT COMPULSORY DUES PAYMENT PURSUANT TO A VALID UNION SECURITY AGREEMENT

The result of the statutory scheme created by the amended National Labor Relations Act, insofar as it is now material, is to divest both employers and unions of any control over employment utilized to advance or retard an employee's exercise of the right to participate in or to forego union activity. The single limitation placed on an employee's freedom is that, pursuant to a valid union security agreement (which admittedly was not present in this case), he may be compelled to pay union dues and initiation fees.

Section 7 of the Act is the cornerstone of the statutory scheme. It states that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection * * *." In addition to specifying the right to participate in union activity, Section 7 adds that employees:

shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

To safeguard the exercise of these rights against infringement by employers, Section 8 (a) (1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." More specifically, Section 8 (a) (3) of the Act prohibits an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The proviso added to this Section illuminates the scope of the prohibition as well as the extent of the exception to it. The proviso permits an employer to make "an agreement with a labor organization" requiring "as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." The making of the agreement is hedged with the requirements (1) that the labor organization be free of employer control or assistance, (2) that it represent a majority of the employees within the

appropriate unit, and (3) that the labor organization shall have obtained statutory authorization to negotiate the agreement.⁴ Even where, unlike this case, these requirements are met, performance of the agreement is circumscribed by provisos (A) and (B) of Section 8 (a) (3) which provide:

no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The statutory requirement is thus explicit that no reason other than failure to tender periodic dues and initiation fees shall warrant discrimination against an employee pursuant to a union security agreement.

⁴ Before October 22, 1951, at the time this case arose, statutory authorization comprised certification by the Board that a majority of the employees eligible to vote had voted to empower the labor organization to negotiate such an agreement. By amendment on October 22, 1951 (65 Stat. 601, 29 U. S. C., Supp. V, Sec. 158(3)), this requirement was repealed, and in its place Congress substituted an express condition, formerly subsumed in the election requirement, that the labor organization shall have secured from the Board a "notice of compliance" with the filing requirements of Section 9(f), (g), and (h) of the Act.

To protect employees from the abridgment of their rights by labor organizations, Section 8 (b) (1) (A) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7," ^{with the} ~~with the~~ proviso that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8 (b) (2) of the Act further forbids a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a) (3) * * *."⁵ In consequence, the discrimination which a labor organization may not cause or attempt is the same as that which an employer may not effect.

B. CONGRESS SOUGHT TO ELIMINATE UNION ABUSES OF
CONTROL OVER EMPLOYMENT IN THE FIELD OF
UNION ACTIVITY BY PERMITTING THE EXERCISE
OF CONTROL ONLY THROUGH A VALID UNION SE-
CURITY AGREEMENT AND ONLY FOR THE PURPOSE
OF COMPELLING DUES PAYMENT

The reach of the pertinent statutory provisions can best be understood in relationship to the abuse they were designed to curb. For present purposes,

⁵ Section 8(b)(2) continues: "* * * or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

that abuse in the view of Congress arose from the control over employment which a union exerted discriminatorily through a closed shop agreement. Therefore, in order to ascertain the divestment of a union's control over employment which the present statutory scheme works, it is appropriate to inquire into the system which prevailed under the Wagner Act, the evil Congress perceived in it, and the steps which it took to correct it. This will show that the only means by which a union may compel the payment of dues is through a valid union security agreement, and that there is no other way in which a union may exercise discriminatory control over employment based on an employee's failure to adhere to membership standards.

Under the Wagner Act, the maximum control over employment which a union could lawfully exert by discrimination was through the closed shop agreement. The social advantages attributed to the closed shop agreement by its proponents may be described as (1) sharing the cost, (2) security, and (3) responsibility. In terms of sharing the cost, it requires all those who obtain the benefits of union standards to share the financial burdens incurred in their acquisition and maintenance; in terms of security, by requiring all employees to be union members, it prevents attrition of the union's membership, thereby maintaining and enhancing its bargaining power through the strength which comes from unity; in terms of responsibility, by subjecting all the employees to common union discipline, it enables the union to

enjoin adherence to its rules and to the obligations of the collective bargaining agreement.⁶

These advantages are obtained under closed shop agreements by vesting the union with the power to cause impairment of a worker's tenure of employment if the worker fails to acquire or retain union membership in good standing in accordance with standards prescribed by the union. Thus the union's control over employment is at the root of a closed shop agreement. "It puts the employment office under a veto of the union, which uses its own membership standards as a basis on which to exclude men from employment."⁷ Before its amendment in 1947, so far as federal law was concerned, the Wagner Act permitted untrammelled enforcement of such agreements. *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 361.

In 1947, however, Congress determined that the advantages which flow from a union's control over employment are overbalanced by the abuses engendered. The House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 34):

The system enslaves workers to the union, creates a tight monopoly that deprives deserv-

⁶ This generalized statement is derived from: *The Closed Shop and Union Security*, Economic Brief of the American Federation of Labor, submitted in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U. S. 525, and from the materials collected in Appendix B, pp. 86-116, of the Board's brief in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, Nos. 66, 67, October Term, 1944.

⁷ Mr. Justice Jackson, dissenting in *Wallace Corporation v. National Labor Relations Board*, 323 U. S. 248, 267-268.

ing men of the right to work and that is the cornerstone of practices of unions, acting alone or jointly with employers, that raise prices, impair output, and restrain trade.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6, 7) :

We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged

* * * * *

If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is essential to earning a living, Congress cannot ignore the existence of such power.

Among the instances of abuse noted were: preventing an employee from campaigning to displace the incumbent union with another union more to the employee's liking;⁸ causing the discharge of a union member because he testified against a union shop steward,⁹ or refused to contribute to a political fund,¹⁰ or attempted to run for office against the incumbent president of the interna-

⁸ S. Rep. No. 105, 80th Cong., 1st Sess., 21-22; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44.

⁹ S. Rep. No. 105, 80th Cong., 1st Sess., 6-7; 93 Cong. Rec. 3837, 4135, 4193, 4886.

¹⁰ 93 Cong. Rec. 4135, 4432.

tional union,¹¹ or refused to buy a ticket for a raffle supported by the union;¹² and causing discharge because of a worker's race.¹³ Epitomizing the antipathy towards union control over employment, Senator Taft referred to "a member of a union who displays an antiunion attitude", and observed that (93 Cong. Rec. 4191):

It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation.

Congress weighed the abuses of union security agreements against the social advantages attributed to them. In so doing, it was impressed only with the argument that their use was desirable as a means of requiring employees to share the cost. As a result, by proviso (B) to Section 8 (a) (3), Congress permitted the making of a union security agreement but it confined its enforcement to compelling the payment of periodic dues and initiation fees (*supra*, p. 15). The Senate Report stated:¹⁴

* * * abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. * * *

¹¹ *Ibid.*

¹² *Ibid.*

¹³ 93 Cong. Rec. 4193.

¹⁴ S. Rep. No. 105, 80th Cong., 1st Sess., 6-7; see also, 93 Cong. Rec. 4135, 4432.

In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

* * * * *

It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.

In his major speech on the floor of the Senate explaining the amendments, Senator Taft stated (93 Cong. Rec. 3837):

In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues.

Senator Taft later stated in identical tenor (93 Cong. Rec. 4887):

I may say that the argument made for the union shop, and against abolishing the closed shop, is that if there is not a closed shop those not in the union will get a free ride, that the union does the work, gets the wages raised, then the man who does not pay dues rides along freely without any expense to himself.
* * * under the rule of the committee, we

pretty well take care of that argument. There is not much argument left.¹⁵

In Congress, opponents of the measure objected to restricting enforcement of union security agreements to the payment of dues, for, as they conceived it, this sharp restriction negated the major advantages believed to inhere in such agreements.¹⁶ But the policy consideration which prevailed in Congress was to foreclose all discriminatory control over employment by unions with one exception. That exception was made only broad enough to give unions an opportunity to eliminate free riders by compelling dues payments through a union security agreement. Congress permitted a union to adopt and pursue any membership policy it deems wise, and to deny or terminate membership on any ground it chooses, but forbade a union from invoking a union security agreement for the purpose of enforcing any aspect of its membership

¹⁵ In its report on the operation of the amended Act after it went into effect, the Joint Committee stated that (S. Rep. No. 986, pt. 3, 80th Cong., 2d Sess., 52): "When Congress abolished the closed shop and permitted the union shop with the safeguard that it might not be used to deny employment to anyone whose lack of membership was occasioned by anything other than refusal to pay a reasonable initiation fee and regular membership dues, it was attempting to eliminate the abuses of compulsory membership while still permitting labor organizations to enjoy a form of union security. * * * In permitting a limited form of compulsory membership, Congress recognized that the 'free rider' argument had some validity."

¹⁶ S. Min. Rep. No. 105, 80th Cong., 1st Sess., 9; H. Min. Rep. No. 245, 80th Cong., 1st Sess., 80; 93 Cong. Rec. 4032, 4191-92, 6296.

policy other than payment of dues.¹⁷ Thus, the House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 32):

* * * if the suspension or expulsion results from anything other than nonpayment of initiation fees and dues * * *, the union may not require an employer to discharge the member under an agreement * * * making union membership a condition of employment. * * * In brief, a union may deny membership to an employee upon any ground it wishes, but the only ground on which it can have him discharged under a "union security" clause is nonpayment of initiation fees and dues; * * * once it has admitted a man to membership it can suspend or expel him for several reasons, but its action cannot cost him his job unless it was for not making the specified payments.

¹⁷ The House bill had contained restrictions on the power of a union to suspend or expel its members. H. R. 3020, 80th Cong., 1st Sess., April 18, 1947, Sec. 8(c) (6), in 1 Leg. Hist. 158, 181. However, these restrictions were not carried over to the amended Act as finally adopted. Instead, Section 8(b) (1) of the Act, while forbidding restraint and coercion of employees by unions, has an express proviso stating that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The purpose of this proviso is to assure that the internal administration of a union insofar as it pertains to admission or expulsion of members is to be unaffected by the amendments. 93 Cong. Rec. 4271-72. In conference this view prevailed and was embodied in the proviso. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 46. However, while leaving a union free to promulgate any membership program it chooses, Congress divested a union of control over employment to enforce its membership policy. *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008, 1012 (C. A. 7), certiorari denied, 342 U. S. 815.

The Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 20-20):

The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom.

* * *

* * * * *

* * * It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described.¹⁸ Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment. Discrimination is permitted only if he has failed to tender dues and initiation fees

* * *

The line drawn by the House and Senate Reports is clearly marked as well in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4272; see also 93 Cong. Rec. 4193):

¹⁸ The Senate bill evidently permitted a union to discriminate against an employee pursuant to a union security agreement for (1) an employee's failure to pay dues and (2) for an employee's campaigning to oust the incumbent union at a period inappropriate for a redetermination of representatives. H.R. 3020, 80th Cong., 1st Sess., May 13, 1947. Secs. 8(a) (3) and (b) (2), in 1 Leg. Hist. 237-238, 239-240. It was to these "two situations" that the Senate Report referred. However, the conference agreement limited the permissible enforcement of a union security agreement to the payment of dues only.

Mr. TAFT. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.

* * * * *

Mr. PEPPER. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.

Mr. BALL. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

In sum, the statutory scheme clearly establishes, and its legislative history conclusively confirms, that a labor organization is divested of all control over employment for the purpose of either advancing or retarding an employee's exercise of his right to participate in or to forego union activity, with a single narrow exception. That narrow exception permits a union through a valid union security agreement to compel payment of union dues. This aside, the power of a union to discriminate in employment has been annulled by the Act. *Union Starch & Refining Co. v. National Labor Relations Board*, 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815 (compulsion under a union security

agreement to take an oath of allegiance to the union); *National Labor Relations Board v. Electric Auto-Lite Co.*, 196 F. 2d 500 (C. A. 6), enforcing 92 NLRB 1073 (compulsion under a union security agreement to attend union meetings); *National Labor Relations Board v. Eclipse Lumber Co.*, 31 LRRM 2065, 2066-67 (C. A. 9, November 12, 1952) (compulsion under a union security agreement to pay special assessments and fines).

C. WITHOUT A VALID UNION SECURITY AGREEMENT,
REDUCTION IN AN EMPLOYEE'S SENIORITY FOR
DUES DELINQUENCY IS DISCRIMINATION WHICH
ENCOURAGES "MEMBERSHIP" WITHIN THE
MEANING OF SECTION 8(a)(3)

In the teeth of the Act's guarantee that no payment of union dues shall be compelled except through a valid union security agreement, the court below holds that an employee's seniority may be reduced for delinquency in paying dues without the sanction of a valid union security agreement. This result is so at odds with Congress' manifest objective that were it the only consequence of the court's interpretation, it would be enough to invalidate its reasoning. But the court's decision undercuts the statutory scheme even more seriously. If the sanction of a valid union security agreement is not indispensable to compelling dues payment, there is no reason, at least insofar as the prohibition of Section 8 (a) (3) and (b) (2) is concerned, why dues payments may not be exacted by an employer-assisted union which does not represent a majority

of the employees and is without statutory authorization to negotiate a union security agreement; for the statutory preconditions to a union's eligibility to negotiate a union security agreement are inoperative safeguards if dues payment can be compelled without agreement. Furthermore, on the precise reasoning followed by the court below in this case, there is no reason why an employee's seniority may not be reduced for refusal to buy a ticket for a raffle supported by the union, for testifying against a union shop steward, or for running for office against an incumbent union official. Yet these are the very practices which Congress denounced (*supra*, pp. 19-20) and which the statutory scheme it formulated was designed to preclude.

An interpretation of the Act so inconsistent with its demonstrable purpose cannot be sound. It rests on the court's basic misconception that "membership in any labor organization," which Section 8 (a) (3) states shall not be encouraged or discouraged by discrimination, refers only to the enrollment of an employee in a union. On this view, the effect of discrimination is relevant only as it induces an employee to join or withdraw from a union. Hence, according to the court in this case, since employee Boston was always a member of the Union, and was not induced either to retain or discontinue his membership, the reduction in his seniority for dues delinquency was an immaterial discrimination. But, as we now show, "membership in any labor organization" embraces the status of membership *in good standing*, of which payment

of dues is an indispensable attribute; reduction in an employee's seniority for dues delinquency is obviously and necessarily designed to encourage his membership in good standing and is, therefore, squarely within the Act's condemnation.

1. *Membership embraces membership in good standing, which is plainly encouraged by discrimination for dues delinquency*

Membership in a labor organization in trade union usage embraces membership in good standing. Good standing is based on the faithful performance of membership obligations. A member who defaults in the performance of his union obligations subjects himself to the risk that the union will deprive him of his good-standing status. Keeping current in the payment of union dues is the most common requirement of membership in good standing, and delinquency in dues payment is the garden variety reason for loss of good standing. In this case, for example, the Union's by-laws expressly specify that "To be in continuous good standing, a member must pay his dues on or before the first of the month, in advance" (R. 65).

Union security agreements incorporate this concept of union membership. Such agreements are customarily phrased in terms of requiring membership in good standing.¹⁹ In this case, for ex-

¹⁹ For typical Wagner Act Agreements incorporating this meaning, see *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 357-358; *National Labor Relations Board v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 688-689.

ample, although the union security agreement was inoperative because of the lack of statutory authorization on which its effectuation depended (*supra*, pp. 3-4), it was worded as a requirement that employees "shall be members of the union in good standing as a condition of continued employment" (R. 38).²⁰

It was on this common understanding of the meaning of membership that the National War Labor Board acted during World War II. In compromising the claim of organized labor that it should be awarded the closed or union shop in exchange for relinquishing the right to strike, the War Labor Board granted labor organizations a provision guaranteeing maintenance of membership. *Federal Shipbuilding and Drydock Company*, 1 War. Lab. Rep. 140. It required that an employee already a union member was "to maintain his membership in the Union in good standing" during the life of the agreement (*id.*, at 141; emphasis supplied). The War Labor Board defined good standing, recognizing that it would be lost and that the employee would risk discharge unless he agreed to pay his financial obligations to the union, to mean that (*ibid.*):

In order to maintain good standing in the Union * * * an employee shall be required to pay only the regular monthly dues or fines

²⁰ The same is true of the agreement in *Radio Officers' Union of the Commercial Telegraphers Union v. National Labor Relations Board*, No. 230, this Term, which is the companion case to this one.

and comply with any other penalties that may be imposed upon him by the Union for specific acts involving the violation of any of the terms and conditions of this agreement, or *violation of any of the terms or conditions of the constitution or by-laws of the Union.* [Emphasis supplied.]

Thus the maintenance of membership agreement required "members to abide by the *obligation as to union membership* and check-off which they individually and voluntarily assume." *Bethlehem Steel Corp.*, 1 War Lab. Rep. 325, 331 (emphasis supplied).

In forbidding discrimination to encourage or discourage "membership in any labor organization," Section 8 (3) of the Wagner Act was based on this common understanding that "membership" embraces maintaining good standing status.²¹ It was uniformly recognized that, pursuant to a valid union security agreement, discrimination against an employee was justified because of his loss of membership in good standing, and the inquiry was directed to whether the discrimination was sanctioned by a valid agreement.²² Conversely, if an

²¹"Collective bargaining * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346, quoted in *National Labor Relations Board v. American National Insurance Co.*, 343 U. S. 395, 408.

²²*E.g.*, *Premo Pharmaceutical Laboratories, Inc.*, 42 NLRB 1086, 1098-1099, enforced, 136 F. 2d 85 (C. A. 2); *Tappan Stove Co.*, 66 NLRB 759, 783, enforced, 174 F. 2d 1007, 1012 (C. A. 6); *John Engelhorn & Sons*, 42 NLRB 866, 879, enforced, 134 F. 2d 553, 558 (C. A. 3).

employee defaulted in the performance of a membership obligation, but the union did not translate this default into at least loss of good-standing membership, a valid union security agreement could not be invoked to justify any discrimination against the employee for failure to maintain his good standing.²³ Furthermore, it was never doubted that a valid union security agreement could be properly invoked to cause the discharge of an employee *suspended* from membership, despite his retention of his status as a member on the union's rolls, and that it was unnecessary totally to sever the employee's membership in a union through expulsion.²⁴ This followed *a fortiori* from the fact that loss of membership in good standing was alone enough to justify the discharge. In short, inquiry did not stop with determining whether an employee joined, remained in, or withdrew from a union as a result of discrimination; there remained the question of the effect of the discrimination on maintaining membership in good standing.²⁵

²³ *Ansley Radio Corp.*, 18 NLRB 1028, 1042-43; *National Labor Relations Board v. Federal Engineering Co.*, 153 F. 2d 233, 235 (C. A. 6), enforcing 60 NLRB 592, 593.

²⁴ *E.g.*, *Colgate-Palmolive-Peet Co.*, 70 NLRB 1202, enforced, 171 F. 2d 956 (C. A. 9), reversed, 338 U. S. 355 (some employees suspended, others expelled, but all properly discharged pursuant to an agreement requiring membership in good standing).

²⁵ That membership as used in Section 8(3) of the original Act was not limited to the passive status of membership divorced from its attributes is strikingly illustrated by *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), enforcing 48 NLRB 892, 894. In that case, to

Not only was it clear that Section 8 (3) of the original Act contemplated membership in good standing; it was also clear that, without a valid union security agreement, to compel the payment of union dues was in violation of this subsection. For to compel a member to pay union dues obviously encouraged his membership in good standing; and to compel a non-member to pay union dues encouraged him to join, because if he was required in any event to contribute to a union's financial well-being, he had a powerful incentive to participate in its affairs as well. Hence, from the beginning of the Wagner Act's administration, when interpretation had the freshness of contemporaneous understanding, Section 8 (3) was construed to forbid requiring the payment of union dues in the absence of a valid union security agreement. *National Electric Products Corp.*, 3 NLRB 475, 486 and n. 11. As forcefully put in *Sperry Gyroscope Co., Inc. v. National Labor Relations Board*, 129 F. 2d 922, 930-931 (C. A. 2), enforcing 36 NLRB 1349, 1367:²⁶

defend its discrimination against employees for engaging in union activity, the employer maintained that no employee had been dissuaded from remaining in the union. Rejecting that defense, the Ninth Circuit observed that "All employees might deem it wise to forego all active part in union affairs thereby in effect relinquishing their right to membership in a labor union." The Court thus assimilated "membership in a labor union" to taking an "active part in union affairs" and held that to discourage one was to discourage the other.

²⁶ See also, *Tappan Stove Co.*, 66 NLRB 759, 783, enforced, 174 F. 2d 1007, 1012 (C. A. 6); *National Labor Relations Board v. John Engelhorn & Sons*, 134 F. 2d 553, 558 (C. A. 3), enforcing 42 NLRB 866.

Discharge of an employee because he has failed to pay dues to a union is the clearest sort of violation of Section 8 (3) of the Act, so much so that a proviso had to be included in Section 8 (3) to authorize closed shop agreements; such a discharge ^{can only be} ~~can only be~~ justified if it comes within that proviso.

And this conclusion is in keeping with the explanation in the Senate Report accompanying the Wagner Act which pointed out that Section 8 (3) "rounds out the idea expressed in section 7 (a) of the National Industrial Recovery Act to the effect that—'No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or *assisting* a labor organization of his own choosing * * *.'" S. Rep. No. 573, 74th Cong., 1st Sess., 11 (emphasis supplied). To pay dues to a union palpably assists it, and Section 8 (3) safeguards an employee against "assisting a labor organization" against his will.

This was the situation which prevailed under the original Act. Membership as used in Section 8 (3) embraced membership in good standing; and Section 8 (3) prohibited the compulsory payment of union dues except through a valid union security agreement. Plainly the Congress which enacted the amendments to the Act intended no departure from either view. As the Board has explained concerning the meaning of membership

(*Firestone Tire and Rubber Co.*, 93 NLRB 981, 983):²⁷

* * * Congress intended by the word "membership" to permit a requirement of *membership in good standing*. The proviso to the original Wagner Act was couched, insofar as here relevant, in precisely the same terms as is the proviso to the amended Act. It permitted an agreement to require as a condition of employment "membership" in a union. The word "membership" in that proviso was consistently construed in Wagner Act cases, in accordance with established contractual practice in the field of labor relations [footnote omitted], as sanctioning contracts requiring membership "in good standing." * * * The amended Act, with its amended provisos, does not change the type of membership permitted to be made a condition of employment, although it permits a discharge for loss of "membership" *only* when such membership is lost for failure to tender periodic dues or initiation fees. Thus, the substantial alterations made by the amendments limit the *grounds* on which good-standing membership must be lost in order to legalize discrimination, but do not change the *kind* of membership that

²⁷ The *Firestone* case is the exact analogue to the instant case. It involves the same union, represented by the same counsel, indulging in the same practice of reducing an employee's seniority for delinquency in dues payment. The crucial difference is that in *Firestone* the discrimination practiced had the sanction of a valid union security agreement and was therefore privileged. In this case, the Union seeks to accomplish without a valid agreement the same discrimination which *Firestone* justified only because of the existence of the agreement.

must be lost [footnote omitted]. Congress, when it repeated the precise phraseology of the original Act in this respect, was apparently satisfied with the Board's consistent construction of the original proviso as permitting a requirement of membership *in good standing*.

No inference is necessary to show Congressional awareness of this meaning of the term "membership." In describing the data which a union must furnish to the Secretary of Labor in order to be eligible to invoke the Board's processes, and the filing of which is a condition precedent to a union's authority to effectuate a union security agreement (*supra*, p. 15 and n. 4), Congress called for a report on "the regular dues or fees which members are required to pay in order to remain members *in good standing* of such labor organization." (Section 9 (f) (5) of the Act; emphasis supplied.)

To interpret membership as embracing membership in good standing is the "natural construction which the text, the legislative setting and the function of the statute command * * *." ²⁸ It fulfills the manifest purpose of Congress to illegalize compulsory dues payment by union members except through a valid union security agreement. In this case, employee Boston was delinquent in his payment of dues, and according to the Union's by-laws, a member must keep current in his dues payment "To be in continuous good standing" (R.

²⁸ *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 186.

65). For his delinquency he was penalized by a reduction in his seniority. This palpably encouraged him to maintain his membership in good standing. But since the discrimination against him was without the sanction of a valid union security agreement, it violated Section 8 (b) (2) of the Act.

2. Membership, even in the restricted sense of enrollment in the union, is encouraged by discrimination for dues delinquency

Even if membership is restricted to enrollment in a union, the court below fails adequately to evaluate the influence on enlisting and maintaining membership which is exerted by compulsory dues payment.

Compulsory dues payment assures the union a steady and predictable flow of revenue. Guaranteed funds enable the union to confer better services both upon its members and upon the employees it represents. Improved services enhance the attractiveness of the union, and tend therefore to influence present members to remain in the union and non-members to join.

In addition, the compulsory enforcement of dues collection through control over the job has independent significance. The capacity of a union to impair an employee's tenure of employment forcefully demonstrates its power. It illustrates its potency as an "organization whose assistance is to be sought and whose opposition is to be avoided" (R. 26). In evaluating the use of "economic power

* * * over other men and their jobs to influence their action,"²⁹ it cannot be overlooked that "slight suggestions" may have "telling effect among men who know the consequences of incurring the * * * strong displeasure" of those who control employment.³⁰ Therefore, to those employees who in earning a living must reckon with a union exercising control over employment to compel adherence to its rules, it may well seem discreet to join or remain in the union without the appearance of dissidence.

Hence, discrimination to compel dues payment has a cognizable effect on encouraging joining and remaining in a union.

3. *Discrimination is outlawed if it tends to encourage or discourage union membership and reduction in seniority for dues delinquency has an encouraging tendency*

Under either view of the meaning of membership—whether it is restricted to enrollment or embraces good standing status as well—"under section 8 (3) any discrimination is outlawed which any labor organization." H. Rep. No. 1147, 74th *tends to 'encourage or discourage membership in Cong., 1st Sess., 21 (emphasis supplied). It is necessary only reasonably to infer that the discrim-*

²⁹ *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 503, n. 6, quoting Mr. Justice Douglas in *Thomas v. Collins*, 323 U. S. 516, 543.

³⁰ *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 78, 80.

ination "was of such a character as to have a *natural tendency*" to induce or dissuade from membership. *General Motors Corp.*, 59 NLRB 1143, 1145, enforced with immaterial modification, 150 F. 2d 201 (C. A. 3) (emphasis supplied). Accord: *National Labor Relations Board v. Gaynor News Co.*, 197 F. 2d 719, 722-723 (C. A. 2), certiorari pending, No. 371, this Term; *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9); *National Labor Relations Board v. J. G. Boswell & Co.*, 136 F. 2d 585, 595-596 (C. A. 9); *National Labor Relations Board v. Brezner Tanning Co.*, 141 F. 2d 62 (C. A. 1); *National Labor Relations Board v. Vail Mfg. Co.*, 158 F. 2d 664, 666-667 (C. A. 7), certiorari denied, 331 U. S. 835; *National Labor Relations Board v. Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. A. 2).

In this case, the requisite tendency to affect membership inheres in the discrimination practiced. Reduction in an employee's seniority for dues delinquency irrefutably tends to encourage his membership in good standing. That is its reason and its inescapable effect. And as it relates to the narrower meaning of membership, the discrimination, as we have shown (*supra*, pp. 36-37), tends to encourage the acquisition and retention of membership. It is immaterial that the "union-encouraging effect of discriminatory treatment is not felt immediately;" it is enough if "there is a reasonable likelihood the effects may be felt years later * * *." *National Labor Relations Board*

v. *Gaynor News Co., Inc.*, 197 F. 2d 719, 723 (C. A. 2), certiorari pending No. 371, this Term.

The court below holds, however, that it is not enough reasonably to infer the consequences from the character of the discrimination; independent evidence must be introduced to establish an actual manifestation of the forbidden effect (R. 93-95).³¹ But as this Court has held, in rejecting a contention that "there must be evidence * * * to show that [conduct] * * * interfered with and discouraged union organization," the requirement of proof necessitates only "the production of evidential facts;" it does not "compel evidence as to the results which may flow from such facts." *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, 800. The Board "may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven," and the inference drawn carries the authority of a conclusion "made by experienced officials with an adequate appreciation of the complexities of the subject entrusted to their administration" (*ibid.*, at p. 800).³² In

³¹ We assume that if the court had understood membership to embrace good standing, it would have been satisfied that the evidence of discrimination sufficiently establishes encouragement of membership in good standing even on its own test. Its view of the inadequacy of the evidence in this case relates only to its narrow conception of the meaning of membership.

³² The amended Act does not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 488.

this case the "evidential facts" were established,—reduction in seniority for dues delinquency—and the inference the Board drew, that an unlawful tendency to encourage membership had been shown, was "reasonably * * * based upon the facts proven * * *."

If independent evidence must be adduced to establish the proscribed tendency, this can ordinarily be done only by taking testimony from the employees concerning their reaction to the discrimination practiced. But "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588. If nothing else, "a feeling by employees 'that they were under no sense of constraint * * * is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception.' " *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 231, quoting from *Bethlehem Shipbuilding Corp. v. National Labor Relations Board*, 114 F. 2d 930, 937 (C. A. 1). Hence, the conclusion concerning the effect of proscribed conduct "must of necessity be based on the existence of conditions or circumstances * * * as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 588. This is the test in determining whether, in violation

of Section 8 (a) (1) of the Act, conduct tends "to interfere with, restrain, or coerce" employees in the exercise of their guaranteed rights. We discern no reason for applying a different test in determining whether discrimination tends "to encourage or discourage" membership. And by that test it does not matter whether the conduct proscribed results in an employee's actually feeling constrained; it matters only that the conduct can be reasonably said to have that tendency. *Western Cartridge Co. v. National Labor Relations Board*, 134 F. 2d 240, 244-245 (C. A. 7), certiorari denied, 320 U.S. 746; *National Labor Relations Board v. Ford Bros.*, 170 F. 2d 735, 738 (C. A. 6); *Joy Silk Mills, Inc. v. National Labor Relations Board*, 185 F. 2d 732, 743-744 (C. A. D. C.), certiorari denied, 341 U. S. 914; *National Labor Relations Board v. Brezner Tanning Co.*, 141 F. 2d 62, 64 (C. A. 1); *National Labor Relations Board v. John Englehorn*, 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board v. A. S. Abell Co.*, 97 F. 2d 951, 955-956 (C. A. 4); *Humble Oil & Refining Co. v. National Labor Relations Board*, 113 F. 2d 85, 92 (C. A. 5); *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); *Elastic Stop Nut Co. v. National Labor Relations Board*, 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

Furthermore, if the reaction actually manifested by the employees to the discrimination is what is pertinent, and not the tendency of the discrimination to evoke the reaction whether or not it mate-

rialized, then the outlawry of discrimination depends on the unacceptable test whether it "succeeded or failed."³³ *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); see also, *National Labor Relations Board v. John Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3). Discrimination would or would not be proscribed depending on the hardihood, timidity, or indifference of the employees against whom it was directed. According to their temperaments, discrimination may stiffen the resolve of some employees to maintain their position, it may enfeeble the determination of others, and still others may be unaware whether the impact of the discrimination on them has been innocuous or telling. After ascertaining the diverse reactions, presumably, under the test of the court below, the net effect would have to be calculated, and, based on the result, the discrimination would or would not be held to constitute a violation. On this approach, a simple and uniform standard by which to ascertain whether particular acts constitute proscribed

³³ We are not driving the court's reasoning to an extreme it has not already accepted. In *Modern Motors, Inc. v. National Labor Relations Board*, 198 F. 2d 925, 926 (C. A. 8), while holding that discriminatory discharges by an employer violated Section 8(a) (1) of the Act, the court refused to hold that they also violated Section 8(a) (3). The court reasoned that whatever might be "the right of the Board to evaluate in an equivocal situation the tendency of such action generally," such an "abstract inference" cannot prevail in the face of "specific, unequivocal, demonstrative proof of actual contrary result." The "actual contrary result" was that the discriminatory discharges "directly stimulated union interest and affiliation" and "under these conditions could hardly realistically be appraised as 'discouraging membership in a labor organization.'"

discrimination can never be developed, for whether or not discrimination was to be found would vary with the different reactions the same conduct might evoke in different cases.

It seems clear that to look to the actual reaction of the employees is to go off on an unworkable and irrelevant tangent. Actual reaction is relevant only to the success or failure of the discrimination practiced. There is no warrant for assuming that the Act is indifferent to its unsuccessful breach. Discrimination is forbidden by Section 8 (a) (3) and 8 (b) (2) if it has a tendency to encourage or discourage union membership; the existence of the tendency may reasonably be inferred from the character of the discrimination. In this case the reduction in seniority for dues delinquency meets these standards.

D. A UNION, BY CAUSING REDUCTION IN AN EMPLOYEE'S SENIORITY FOR DUES DELINQUENCY, IS GUILTY OF RESTRAINT AND COERCION OF THE EMPLOYEE IN EXERCISING HIS RIGHT TO REFRAIN FROM ASSISTING A UNION WITHIN THE MEANING OF SECTION 8 (b) (1) (A) OF THE ACT

In its decision, the court below failed to consider the Board's conclusion that, independently of its violation of Section 8 (b) (2) of the Act, the Union violated Section 8 (b) (1) (A) of the Act.

Section 8 (b) (1) (A) forbids a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7 * * *."

Section 7 states that employees shall have the right to "assist labor organizations," but that they shall also have the right to "refrain" from this activity, except to the extent that its exercise may be abridged by a valid union security agreement. Since no such valid agreement exists in this case, the right of the employees involved to refrain from assisting a labor organization is unlimited.

To pay union dues is plainly to assist a labor organization; conversely, to be delinquent in payment is clearly to refrain from assisting a union. That abstention is safeguarded by the Act against restraint or coercion.

In this case, employee Boston was delinquent in his dues payment, and for this reason his seniority was reduced by the Union. To impair a worker's tenure of employment is to restrain or coerce him, for there is little to which an employee is more sensitive than diminution of his earning capacity. The Union's conduct, therefore, falls within the ban of the plain meaning of Section 8 (b) (1) (A).³⁴

³⁴ However, if the Union's conduct falls only within the prohibition of Section 8(b)(1)(A), part 1(a) and (b) of the Board's order (R. 16) would appear to require refashioning insofar as those provisions of the order are addressed to a violation of Section 8(b)(2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.

WALTER J. CUMMINGS, JR.,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
ELIZABETH W. WESTON,

LOUIS SCHWARTZ,
Attorneys,
National Labor Relations Board.

DECEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, and 65 Stat. 601, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making

an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made [; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h), and (i) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:*³⁵ *Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to*

³⁵ Provisions which were eliminated by 65 Stat. 601 are enclosed in brackets; provisions which were added by that amendment are in italics.

other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * *

(e) [(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition

alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) * * *]

1) *Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.*

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion

that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

* * * * *

(c) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein,

and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

FILE COPY

Office - Supreme Court, U. S.

FILED

SEP 22 1952

No. ~~301~~ 6

CHARLES ELMORE OROPELY
CLERK

In the Supreme Court of the United States

October Term, 1952.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD
AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.

CLIF. LANGSDALE, 18884
JOHN J. MANNING,
922 Searritt Building,
Kansas City 6, Missouri,
Counsel for the Respondent.

BLEED THROUGH- POOR COPY

INDEX.

	PAGE
Preliminary statement	1
Question presented	3
Additional statement of the case.....	4
Reasons for denying the writ.....	5
Conclusion	17

Cases Cited.

American Pipe and Steel Corp., 93 NLRB No. 11.....	14, 15
Associated Press v. NLRB, 301 U. S. 103, 57 S. Ct. 650..	8
DeMille v. American Federation of Radio Artists, 333 U. S. 876, 68 S. Ct. 906.....	13
NLRB v. Air Associates, Inc., 2 Cir., 121 F. 2d 586 (4 Labor Cases, para. 60,587, 60,716).....	6
NLRB v. Cities Service Oil Co., 129 F. 2d 933, 937 (6 Labor Cases, para. 61,147).....	6
NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240, 59 S. Ct. 490	8
NLRB v. Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615	8
NLRB v. Potlatch Forests, 189 F. 2d 82, 85.....	9
NLRB v. Public Service Co-Ordinated Transport, 3 Cir., 177 F. 2d 119 (17 Labor Cases, para. 65,322).....	6
NLRB v. Reliable Newspaper Delivery, Inc., 187 F. 2d 547 (C. A. 3)	5
NLRB v. Reynolds International Pen Co., 7 Cir., 162 F. 2d 680, 690 (13 Labor Cases, para. 63,872)	7
NLRB v. Robbins Tire and Rubber Co., Inc., 5 Cir., 161 F. 2d 798, 801 (12 Labor Cases, para. 63,776).....	7
NLRB v. The Radio Officers Union, etc., 196 F. 2d 960..	5
NLRB v. Virginia Electric & Power Co., 314 U. S. 469, 479, 62 S. Ct. 344.....	10

INDEX—Continued.

	PAGE
NLRB v. Winona Textile Mills, 160 F. 2d 201.....	10
Quaker State Oil Refining Corp. v. NLRB, 119 F. 2d 631 (4 Labor Cases, para. 60,435).....	6
Stonewall Cotton Mills, Inc. v. NLRB, 5 Cir., 129 F. 2d 629, 633 (5 Labor Cases, para. 61,099).....	6
Wells, Inc. v. NLRB, 9 Cir., 162 F. 2d 457, 459, 460 (12 Labor Cases, para. 63,848).....	7
Western Cartridge Co. v. NLRB, 7 Cir., 139 F. 2d 855, 859 (7 Labor Cases, para. 61,095, 61,967).....	7, 11

Statutes Cited.

National Labor Relations Act:	
Sec. 8(a)(2)	14
Sec. 8(a)(3)	1, 5, 7, 8, 12, 15, 16, 17
Sec. 8(b)(2)	7, 14

Miscellaneous.

Volume II, Labor Law Reports, C.C.H., para. 4,001.....	8
--	---

In the Supreme Court of the United States

October Term, 1952.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD
AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 301.

PRELIMINARY STATEMENT.

The issue here concerns the decision of the United States Court of Appeals for the Eighth Circuit entered April 29, 1952 (196 F. 2d 1), that there was "no evidence in the record either substantial or in the nature of a scintilla to support" the finding of the National Labor Relations Board (94 NLRB 1494) of discrimination which would, or did, "encourage or discourage membership in any labor organization" in violation of Section 8(a)(3) of the National Labor Relations Act.

The court below, in its opinion, found that respondent caused an employer to discriminate against one of its employees and held that "discrimination alone is not sufficient," but that such discrimination must also result in encouragement or discouragement of membership in a labor organization.

QUESTION PRESENTED.

The actual question presented by the record is:

Must the record, as a whole, before the United States Court of Appeals contain substantial evidence to support a conclusion that discrimination in regard to the tenure or condition of employment of an employee did, or would, encourage or discourage membership in any labor organization?

ADDITIONAL STATEMENT OF THE CASE.

In addition to the pertinent facts summarized by the petitioner in its petition for a writ of certiorari, the respondent submits these additional facts:

The charging party, Frank Boston, a member of the respondent, testified that he did not at any time intend to refrain from or evade the obligations of his membership; that he had desired to withdraw the charge filed by him and process the matter through the procedures of the respondent and abide by the majority decision of his fellow members (R.A. 22-24).¹

The agreement between respondent and Byers Transportation Company provided that at the end of thirty days' employment employees automatically received seniority standing. Such agreement did not make membership in respondent a qualification for seniority listing. The record is barren of any evidence of an illegal union shop enforcement (R.A. 33).

¹For purposes of this petition, the printed record before this Court consists of two separately paginated volumes: the volume containing the pleadings and the Board's decision and order as presented to the court below, herein are designated "(R...)," and the appendix to respondent's brief, in the court below, are designated herein "(R.A....)."

REASONS FOR DENYING THE WRIT.

The decision of the court below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board v. The Radio Officers Union, etc.*, 196 F. 2d 960, as petitioner states is the basis for a writ of certiorari. The factual situation in the Radio Officers case, *supra*, was entirely different and distinct from that in the case now before this Court.

In the Radio Officers case, the court, speaking of the actions and conduct of the union and the employer, said (l. c. 965):

"Such conduct displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members."

In the instant case there was no conduct which "displayed to all non-members the union's power." Instead, to the contrary, as we shall hereinafter show, the actions of the respondent and the employer involved, so far as effect on either members or non-members, could only reflect against the union's interests.

There was no basis for the petitioner's finding that the employer discriminated against Boston in violation of Section 8(a)(3) of the National Labor Relations Act. The record in this case is absolutely barren of any evidence at all that the employer's actions in this case encouraged or discouraged membership in a labor organization within the meaning of Section 8(a)(3). As the Court in *NLRB v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), said:

"Even if we should assume that the disparity brought about by the retroactive payments amounted

to discrimination, then, under the statutory language, *we must go further and ascertain whether that discrimination encouraged membership*² in the Newspaper and Mail Deliverers' Union of New York and Vicinity. And we do not find substantial evidence of that encouragement. * * *."

"* * * While our decision in *Quaker State Oil Refining Corp. v. National Labor Relations Board*, 119 F. 2d 631 (4 Labor Cases, para. 60,435), had to do with alleged 8(3) violations which arose out of the actions of employees, the underlying thought of that case is quite material here. We there said at page 633: 'It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. *There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union.*' See also *National Labor Relations Board v. Public Service Co-Ordinated Transport*, 3 Cir., 177 F. 2d 119 (17 Labor Cases, para. 65,322).

"Generally speaking, the proposition that *in order to establish an 8(a)(3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support.* In *National Labor Relations Board v. Air Associates, Inc.*, 2 Cir., 121 F. 2d 586 (4 Labor Cases, para. 60,587, 60,716), the court held at page 592: 'Section 8(3) requires that the discrimination in regard to tenure of employment have *both the purpose and effect of discouraging union membership.*' The later decision in that same circuit, *National Labor Relations Board v. Cities Service Oil Co.*, 129 F. 2d 933, 937 (6 Labor Cases, para. 61,147), in no way restricted that language. In *Stonewall Cotton Mills, Inc., v. National Labor Relations Board*, 5 Cir., 129 F. 2d 629 (5 Labor Cases, para. 61,099), the Board had found certain lay-offs and discharges to have been in violation of Section 8(3). The court said at page 632: 'To make out a case under it, it must

²Throughout this brief, emphasis is ours unless otherwise noted.

appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization.' This conclusion was not disturbed by the motion for rehearing (129 F. 2d 633) which was disposed of entirely upon evidential grounds. To the same effect see *Western Cartridge Co. v. National Labor Relations Board*, 7 Cir., 139 F. 2d 855, 859 (7 Labor Cases, para. 61,095, 61,967); *National Labor Relations Board v. Reynolds International Pen Co.*, 7 Cir., 162 F. 2d 680, 690 (13 Labor Cases, para. 63,872); *Wells, Inc. v. National Labor Relations Board*, 9 Cir., 162 F. 2d 457, 459, 460 (12 Labor Cases, para. 63,848); *National Labor Relations Board v. Robbins Tire and Rubber Co., Inc.*, 5 Cir., 161 F. 2d 798, 801 (12 Labor Cases, para. 633,776).

"As above indicated, we find no substantial evidence in the record to justify the Board's holding that respondent had violated Section 8(a)(3) of the Act. * * *."

A finding that respondent violated Section 8(b)(2) must be preceded by a finding that the employer's actions were violative of Section 8(a)(3). The court below found that the record of this case contains sufficient evidence of respondent having caused the employer to treat Boston's seniority as reduced because of the application of Section 45 of respondent's by-laws. However, respondent contends that this reduction would not result in an unfair labor practice within the meaning of the National Labor Relations Act, because it was not motivated by a desire to encourage or discourage Boston's union membership or non-membership, but rather because of a non-discriminatory by-law of respondent and the non-discriminatory application of that by-law under the collective bargaining agreement. This is not discrimination within the meaning of the Act. The term "discrimination" as

used in Section 8(a)(3) and in the law of labor relations "refers to inequality of treatment based upon the desire of employers to discourage free employee organization for collective bargaining purposes."³

Under Section 8(a)(3) employers may not discriminate in regard to hire or tenure of employment or any term or condition of employment if such action is motivated by a desire to encourage or discourage membership in a labor organization. Employers are not prohibited, however, from *any* discrimination if they are not motivated by a desire to inhibit free organization. In order to hold that a violation of that section has occurred, a preponderance of the evidence must establish that the discrimination was motivated by anti-union considerations. Failing this burden of proof, the Board may not hold that a violation of Section 8(a)(3) has occurred. The employer is free to discourage or otherwise discipline his employees for a good cause, a bad cause or no cause at all, so long as he is not primarily motivated by anti-union considerations and so long as encouragement or discouragement of union membership or activity will not be a direct and foreseeable consequence of the employer's conduct. This Court in upholding the constitutionality of Section 8(a)(3) stated:⁴

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, *the Board is not entitled to make its authority a pretext for interference with the right of discharge when that*

³Volume II, Labor Law Reporter, C. C. H., Para. 4,001.

⁴*NLRB v. Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615; *Associated Press v. NLRB*, 301 U. S. 103, 57 S. Ct. 650; *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490.

right is exercised for *other reasons*, than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." *NLRB v. Laughlin Steel Corp., supra.*

and that:

"We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. * * * To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining." *NLRB v. Fansteel M. Corp., supra.*

Citing this Court's decision in *NLRB v. Fansteel M. Corp., supra*, the Court of Appeals, 9th Circuit, in *NLRB v. Potlatch Forests*, 189 F. 2d 82, 85, said:

"Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Section 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose."

and found that:

"Potlatch has exhibited no anti-union prejudice and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.

"There has been no discrimination between union and non-union employees on the basis of union membership."

The identical situation is present here in that Byers Transportation Company, as between the union members group of employees, has allowed them to make their own determinations of seniority and did not discriminate between its union and nonunion members.

In *NLRB v. Winona Textile Mills*, 160 F. 2d 201, the court, in refusing to sustain a Board determination of discrimination against spinning room employees on account of union activities, said:

"We recognize the broad discretion vested by Congress in the Board to require the reimbursement of workers for loss of wages discriminatorily imposed, and will interfere with exercise of that discretion only for the most cogent reasons. (Citing relevant decisions.) But we have the right *and duty* to reject a conclusion of the Board which disregards or fails to give proper cognizance to uncontradicted or well-established facts. (Citation.) The sanctions of the National Labor Relations Act are imposed for the protection of employees and not in punishment of their employer. *NLRB v. Virginia Electric & Power Co.*, 314 U. S. 469, 479, 62 S. Ct. 344."

The court then held that the evidence sustained the finding that the reason for discontinuance of overtime at employer's mill was the employer's determination to indicate to employees the economic sanctions that could be imposed against them, and that the National Labor Relations Board properly considered the discontinuance of overtime in determining whether employer had interfered with or coerced employees in the exercise of their statutory right, but that where both union and nonunion employees were treated alike there was no discrimination against individual union workers and the board was with-

ut power to require reimbursement of union workers by
he employer.

Again, in *Western Cartridge Co. v. NLRB*, 139 F. 2d
55, the Seventh Circuit Court of Appeals said:

"Without violating Section 8(3) of the Act, the company had a right to discharge these (striking) employees or to refuse to take them back into its employ as long as it did not discriminate against them in such a manner as *to encourage or discourage membership in any labor organization*. (Court emphasis.) * * * Under Section 8(3) of the Act to constitute the unfair labor practice of discrimination, the discrimination with regard to hire and tenure must have *the purpose* 'to encourage or discourage membership in any labor organization.'

"The Board has found discrimination because of concerted activities. We think there is evidence to support such findings. We must go one step further. Was that discrimination to encourage or discourage membership in any labor organization? * * * Without bothering to point out any evidence to support a finding that such discrimination *was for the purpose of encouraging or discouraging membership in any labor organization* (court emphasis), the Board finds such discrimination 'thereby discouraged membership in the Union, etc.'

"We are unable to find in the record any substantial evidence to support a finding that the Company's acts toward its striking employees in the matter of their hire and tenure were taken to discourage membership in a labor organization. * * *

"We recognize the exclusive right of the Board to draw inferences but there must be some evidence from which the inference can be drawn."

Disposing of an additional, separate, individual finding of Section 8(3) violation, the court also said:

"This finding shows only that the Company discharged Goessman for a reason that did not exist in fact. Does it therefore follow as a reasonable inference that Goessman was discharged in order to discourage his membership in a labor organization? * * * We think there is not substantial evidence to support the Board's finding as to Goessman."

The employer, Byers Transportation Company, Inc., was not guilty of discrimination prescribed by Section 8(a)(3) since it did not intend to encourage or discourage membership in a labor organization and such encouragement or discouragement does not logically or impliedly flow from the employer's action. Congress did not intend the phrase "encourage or discourage membership in any labor organization" found in Section 8(a)(3) to encompass a factual situation such as this. Clearly the existence of the respondent's by-law and the employer's assistance in enforcing it would *tend to restrain* applications for membership in respondent. Certainly, it cannot be argued that such was the type of "discouragement" that Congress had reference to in drafting Section 8(a)(3). This discouragement of membership arises from the fact that the by-law of respondent applies *only to members* of that labor organization. Therefore, employees *who are not members* are not affected by the by-law although covered by the seniority clause in the collective bargaining agreement. The record discloses that there is no valid union shop agreement in existence and there is nothing in the record to indicate that respondent and the employer illegally conducted an unlawful union shop arrangement.⁵

⁵Respondent admitted the allegations of paragraph 7 of the complaint (R.A. 3).

Therefore, *it not being incumbent* upon an employee to become a member, it logically follows that it would be to his benefit to refrain from membership and thus *avoid the possibility* of reduction in seniority by application of the by-law. Thus Section 45 of respondent's by-laws does not "encourage" membership. If anything, it should tend to discourage such membership when it is obvious that such membership carries with it a *rather drastic penalty* for failure to keep current in dues payments.

The fact that Boston remained a member after the by-law was *put into effect* several years ago has no particular evidentiary value here since, so far as this record indicates, he may have had many reasons for valuing his membership in respondent and remained a member in spite of, and not because of, Section 45 of the by-laws.

In this case, the employee's reduction in seniority simply *resulted from his agreement*⁶ with the union to abide by its rules. The respondent, while Boston was a member, acting as his bargaining agent and with his full acquiescence, acted for him with his employer with respect to his seniority rights and the matters which would affect such seniority rights. Boston, at the time the agreement was negotiated, could have withdrawn from membership in respondent *without affecting his tenure of employment*. He elected not to do so and the employer only did what Boston, through *his* bargaining agent, requested that it do; that is, to treat Boston's seniority as reduced in line with the employer's agreement with Boston's agent and to regard failure to pay current dues as a "controversy" over seniority standing, which would be referred to the union for settlement. There is nothing in the record which indicates that the employer evidenced

⁶The constitution and by-laws of labor organizations are regarded as contracts between such organizations and their members. *DeMille v. Amer. Fed. of Radio Artists*, 333 U. S. 876, 68 S. Ct. 906.

any feeling one way or the other with respect to the maintenance of Boston's membership in respondent. Thus the reduction in seniority cannot be said to have been motivated by desire to *encourage or discourage* membership in respondent.

Petitioner appears to have erred by failing to distinguish between assistance to respondent and encouraging membership in respondent as those terms are meant where found in the Act. If there was a rival union in the picture, there might be some basis for a charge that the employer in this case had contributed "financial or other support" to respondent in violation of Section 8(a)(2) by aiding in the collection of dues from members. That is not the charge here, nor would such a charge affect this respondent, since a violation of 8(b)(2) cannot be based upon a finding of a violation of Section 8(a)(2) but instead must be preceded, as heretofore pointed out, by a finding of 8(a)(3) violation.

In dissenting, Board Member Abe Murdock said:

"On these facts I fail to perceive any restraint, coercion, or discrimination within the meaning of the sections of the Act which the majority finds have been violated. In what respect was Boston or any other employee of the Employer restrained, coerced, or discriminated against? The theory of the majority perforce must be that the Employer's action to effectuate the Union's by-law constitutes discrimination violative of Section 8(a)(3) because calculated to 'encourage' membership in and adherence to the rules of the Union. Common sense, however, tells us that the employer's action would not encourage membership in the Union.* As there is no union-security clause compelling membership in the Union, it would be quite apparent to Boston that if he resigned from the Union he could suffer no detriment in his em-

*Cf. American Pipe & Steel Corp., 93 NLRB No. 11."

ployment but on the contrary would be better off because he would no longer be subject to the Union's by-laws and subject to reduction in seniority if he fell behind in his dues payments. Contrary to the statement in the majority opinion, I do not overlook the fact that the seniority clause in the contract applies not only to union members but to all employees. But the majority's conclusion from that fact that Boston could not have escaped the reduction in seniority he suffered because of his delinquency by resigning from the union is a *non sequitur*. Their theory apparently is that the seniority clause is somehow discriminatory and would permit the union to apply its by-law and ask a reduction in seniority for nonmember employees who did not pay dues. But it is clear that the union's by-law is applicable only to members and there is not even a suggestion in the case that the union has sought to compel nonmembers to pay union dues or to penalize them for not paying. * * *

The majority of the Board did not assert its reasons⁷ for finding a violation of Section 8(a)(3), but contented themselves with the statement that:

"We agree with the Trial Examiner that the employer, by reducing Boston's seniority for being delinquent in the payment of his union dues, discriminated against Boston and that such discrimination would constitute a violation of Section 8(a)(3) of the Act, where, as in this case, the respondent had not obtained a union shop contract or a certification pursuant to Section 9(e) of the Act. * * * In the American Pipe & Steel Corp. case,^{*} the Board pointed

⁷The court in *Western Cartridge Co. v. NLRB, supra*, called the Board to account for that same failure saying: "Without *bothering* to point out any evidence to support a finding that such discrimination was for the purpose of encouraging or discouraging membership in any labor organization (court emphasis), the Board finds such discrimination 'thereby discouraged membership in the union, etc.'"

^{*}American Pipe & Steel Corp., 93 NLRB No. 11."

out that an employer may not lend his assistance to a union in compelling adherence to the latter's rules for in so doing *an employer would be strengthening the position of such union* contrary to the well-established principle that an employer's acceptance of the determination of a labor organization as to who shall be permitted to work for it is violative of Section 8(a)(3) where no lawful *contractual obligation for such action* exists.

Member Murdock in his dissent distinguishes the facts in the American Pipe & Steel Corp. case from those in the instant case.

The Board did not enlarge upon its statement that "in so doing an employer would be strengthening the position of such union" and in the case at hand it appears clear that, on the contrary, the employer by accepting the union's application of its by-laws would be working a detriment to respondent.

A realistic appraisal of the findings in the present record show simply that a union rule was applied to a willing union member so as to bring about a reduction of his seniority as he had agreed with the union should be done if he became in arrears of his dues. The statute (as to encouragement) applies only to conduct inducing non-members to become members of the union, or inducing members to remain members. The matter here is simply one of the internal affairs of a union and no statutory violation has been established.

As stated above, Section 8(a)(3) of the National Labor Relations Act is violated only if there is a discrimination from which an encouragement of union membership naturally and proximately follows. The petitioner is attempting to broaden the scope of the section so as to make it encompass a far greater meaning than Congress

ever intended. The idea that any assistance or cooperation by an employer in the application of a union's rule to employees who are members of the union and who do not intend to refrain from such membership and its concomitant benefits and liabilities is an enlargement of the plain wording of Section 8(a)(3) of the Act.

Conclusion.

For the reasons above stated, we respectfully submit the application for the writ of certiorari should be denied.

CLIF. LANGSDALE,
JOHN J. MANNING,
Counsel for Respondents.

JAN 5 1953

In the Supreme Court of the United States

October Term, 1952.

No. ~~301~~ 6

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD
and CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L.,
Respondent.

*On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit.*

BRIEF FOR RESPONDENT.

CLIF. LANGSDALE

JOHN J. MANNING,

928 Scarritt Building,
Kansas City, Missouri,

Attorneys for Respondent.

BLEED THROUGH- POOR COPY

INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	6
I. Facts of the case.....	6
II. The Board's conclusions and order.....	8
III. The court's decision.....	9
Summary of Argument	9
Argument	11
A. Respondent as a labor organization is not an entity apart from its collective membership. Its action in applying its by-laws is the exercise of the will of a majority of its members.....	11
B. A finding of a violation of Section 8 (a) (3) of the Act requires a finding of purpose or intention to "encourage" or "discourage" membership in a labor organization	13
C. Certiorari was granted on the question whether the record must contain substantial evidence of the fact that employees were encouraged or discouraged in membership in a labor organization, because, as the result of an application of a by-law of that organization a member's seniority standing had been reduced	23
D. A finding of 8 (b) (2) violation must be predicated upon a finding of violation of Section 8 (a) (3)	29
Conclusion	30

Cases Cited.

Associated Press v. National Labor Relations Board, 301 U. S. 103	16
Consolidated Edison v. National Labor Relations Board, 305 U. S. 197.....	24
DiMaggio v. Elastic Stop Nut Corp., 162 F. 2d 546.....	23
Doyle, et al. v. Div. No. 1127 of Amalgamated Assoc. of St. Electric R. Employees, 76 F. Supp. 655, Aff. 168 F. 2d 876	17

INDEX—Continued.

	PAGE
Elder v. New York Central Ry. Co., 152 F. (2d) 351.....	17
Edelstein v. Duluth Missaben & Iron Range Ry. Co. (Minn. Sup. Ct., 1948), 21 L.R.R.M. 2533.....	17
Elgin J. & E. Ry. Co. v. Burley, 327 U. S. 651.....	20
Firestone Tire & Rubber Co., 93 N. L. R. B. 161.....	12
Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448.....	21
Hartley v. Brotherhood of Railway & Steamship Clerks, 283 Mich. 201, 2 L.R.R.M. 872.....	18
Koury v. Elastic Stop Nut Corp., 162 F. 2d 544.....	23
National Labor Relations Board v. Columbian Enamel- ing & Stamping Co., 305 U. S. 292.....	24
National Labor Relations Board v. Elk Lumber Co., 91 N. L. R. B. 333.....	29
National Labor Relations Board v. Fansteel Metal- lurgical Corp., 306 U. S. 240.....	16
National Labor Relations Board v. Laughlin Steel Corp., 301 U. S. 1.....	16
National Labor Relations Board v. Pittsburgh Steam- ship Co., 340 U. S. 498.....	24
National Labor Relations Board v. Potlatch, 189 F. 2d 82	26
National Labor Relations Board v. Reliable Newspaper Delivery, Inc., 187 F. 2d 547.....	24
National Labor Relations Board v. Webb Construction Co., 196 F. 2d 702.....	28
Ryan v. New York Central Ry. Co., 267 Mich. 202.....	19
Universal Camera Corp v. Labor Board, 340 U. S. 474.....	24
Western Cartridge Co. v. National Labor Relations Board, 139 F. 2d 855	27
Williams v. A. T. & S. F. Ry. Co., 204 S. W. 2d 693.....	20
Wooldridge v. Denver & Rio Grande Western Ry. Co. (Colo. Sup. Ct., 1948) 21 L.R.R.M. 2612.....	17

Statutes Cited.

National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Supp. V, 151, et seq.....	3
Section 7	3
Section 8 (a) (3)	12, 13, 14, 15, 16, 23, 29
Section 8 (b) (1)	13, 30
Section 8 (b) (2)	14, 29, 30

In the Supreme Court of the United States

October Term, 1952.

No. 301.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD
and CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L.,
Respondent.

*On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit.*

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Court of Appeals (R. 90-95) is reported at 196 F. (2d) 1. The findings of fact, conclusions of law, and order of the petitioner (R. 13-30) are reported at 94 N. L. R. B. 1494.

Jurisdiction.

The judgment of the court below was entered on April 29, 1952 (R. 95). The Board's petition for rehearing was denied on June 2, 1952 (R. 99). The petition for a writ of certiorari, filed on August 28, 1952, was granted on October 20, 1952 (R. 101). The jurisdiction of this Court was invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

Questions Presented.

The N. L. R. B. had found that the employer in this case, by reducing an employee's seniority for being delinquent in the payment of his Union dues, discriminated against such an employee in violation of Section (8) (a) (3) of the Act "for, in so doing an employer would be strengthening the position of such Union."

The Court of Appeals found that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure * * * or condition of employment.' This was a violation of Section (8) (b) (2) of the Act. This question confronting us, therefore, is whether there is substantial evidence to support the finding that such discrimination would or did encourage or discourage membership in any labor organization in violation of Section (8) (a) (3) of the Act. Discrimination alone is not sufficient," and that "having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston did or would encourage or discourage membership in any labor organization." That "the testimony of Boston, however, shows clearly that this Act neither encouraged nor

discouraged his adhesion to membership in the respondent Union. The question then is, did the act of the Union encourage or discourage other employees who might learn what had been done? Unless the statute may be interpreted to apply to such other employees there is no evidence, substantial or otherwise, to sustain the order of the Board. If, on the other hand, it must be so construed, then the order is supported only by "suspicion" and speculation. There is no evidence in the record, either substantial or in the nature of scintilla to support it." The question presented is: whether, absent a scintilla of evidence to that effect, there is inherent an *assumed*¹ encouragement or discouragement of membership in a labor organization within the meaning of Section (8) (a) (3) of the Act from a finding of discrimination against an employee arising out of the application of a by-law of a labor organization of which he is a member. More simply stated, was the Court of Appeals correct in holding that the Board had the burden of producing substantial evidence of the fact that "the act of the Union encourage(d) or discourage(d) other employees who *might* learn what had been done."

Statute Involved.

The pertinent provisions of the Labor Relations Act, as amended (61 Stat. 136 and 65 Stat. 601, 29 U. S. C. Supp. V, 141, et seq.), are as follows:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also

¹Throughout this brief emphasis is supplied unless otherwise indicated.

have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(b) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

STATEMENT.

Upon the basis of a charge filed by Frank Boston (R. 2-3), employee of the Byers Transportation Company, a complaint was issued alleging that, in violation of Section 8 (b) (a) and (1) (A) of the Act, the respondent Union had caused the Company to discriminate against Boston by reducing his seniority standing because of Boston's delinquency in paying his dues to the Union (R. 4-6). The findings of fact pertinent to this complaint, which are undisputed, may be summarized as follows:

I.

Facts of the Case.

About eight years ago, after being duly acted upon at three regular meetings, Section 45² of respondent Union's by-laws was passed by a majority vote of the members (R. 58, 71, 72 and 74). Frank Boston, a member of that Union since 1936, opposed passage of that amendment to the by-laws (R. 71).

In 1946 Boston became a truck driver for Byers Transportation Company, a common carrier in motor transportation (R. 54). That employer and the respondent were parties to a collective bargaining agreement known as the "Central States Area Agreement" (R. 37).³ Insofar as employees represented by respondent were concerned that agreement did not contain a Union security clause. Article V of that agreement contained a provision that seniority

²Section 45. Any member, under contract, one month in arrears for dues shall forfeit all seniority rights.

(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues (R. 65).

³This agreement has been executed with employers by more than 300 Locals of the parent Union in 12 different states (R. 75).

should prevail and provided that "any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement" (R. 41). After Section 45 was added to respondent's by-laws, representatives of the employers and the Unions, who were parties to the Central States Area Agreement, discussed that section in connection with Article V of that agreement and agreed that instances "when members become in arrears in their dues and Section 45 of the by-laws has set up" would be "included in the phrase 'any controversy' mentioned in Section 1 of Article V" of the agreement (R. 50, 74-77). Boston did not pay his June, 1950, dues until July 5, 1950. On that date he was No. 18⁴ at the top of the seniority list (R. 56). By automatic application of Sec. 45 of the by-laws his standing was reduced to No. 54 at the bottom of the list.

After filing a charge of unfair labor practice upon which the complaint of petitioner was later issued, Boston asked to be permitted to withdraw such charge. That request was denied (R. 58). He testified that he had agreed and wanted to be bound by the constitution and by-laws of respondent, had no intention of refraining from any of his Union activities or refraining from any of the benefits of liabilities that attend membership in respondent, that his purpose in filing the charge was to try to get rid of Section 45 and that subsequent to such filing he decided that he was not proceeding correctly, and that he "should go through the Union itself to get this rule taken off the books," and "prevail on the rest of the members, or a majority of them at least, to vote the rule out of existence." (R. 72.)

⁴Boston unquestionably enjoyed this high seniority standing because of the fact that there had been many other instances where drivers had been reduced in seniority standing due to the application of Section 45 (R. 50-51).

II.

The Board's Conclusions and Order.

The Board, member Murdock dissenting, found that the Union had violated Section 8 (b) (2) of the Act by causing a reduction in Boston's seniority because of his delinquency in the payment of his dues (R. 14-15, 25-27). The Board held that, "absent a valid contractual union security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues * * *" (R. 14). The Board observed that the discrimination against Boston had the "effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantage in staying in" (R. 27). The Board also held that, in violation of Section 8 (b) (1) (A) of the Act, the Union's reduction of Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization (R. 26, 15).

The Board entered an order requiring the Union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the Company that the Union withdraws its request for the reduction of Boston's seniority and that it requests the Company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance (R. 16-17).

III.

The Court's Decision.

The Board's petition to enforce its order was denied by the court below (R. 31-33, 90-95). The court agreed that the Union had "caused or attempted to cause the employer to discriminate against Boston," but, holding that "discrimination alone is not sufficient," it stated that the question was whether "there is substantial evidence to support the finding that such discrimination would or did 'encourage or discourage membership in any labor organization' * * *" (R. 93-94). Noting that Boston was a member of the Union from the inception of his employment with the Company and is still a member (R. 94), the court below concluded that the reduction in his seniority "neither encouraged nor discouraged his adhesion to membership" in the Union (R. 95). The court states further that, assuming the effect on other employees of the discrimination against Boston was relevant, there was no evidence to support a conclusion that the membership of other employees in the Union was affected (R. 95). The court concluded that the Union had not violated Section 8 (b) (2) of the Act; it did not advert to the Board's companion holding that the Union's conduct violated Section 8 (b) (1) (A) of the Act.

Summary of Argument.

A labor organization is not an entity separate and apart from its collective members. The Union in applying its by-laws did not intend to, nor did such action, encourage membership within the meaning of Section 8 (a) (3) of the Act. There was no discrimination within the meaning of the Act, by the simple application of a Union by-law to a member, where the same by-law was uniformly applied to all other members of the Union.

The Labor-Management Relations Act of 1947, as amended, imposed upon the court below a finding that a question of fact was supported by substantial evidence on the record considered as a whole, and in this case that court was unable to find any evidence in the record which supported two relevant facts, one, that respondent Union's action in applying its by-law had as its purpose encouragement of membership in that Union, and two, that other employees were encouraged or discouraged in such membership by reason of the Union's action.

ARGUMENT.

A. Respondent as a labor organization is not an entity apart from its collective membership.

Throughout the Board's decision and the briefs on behalf of the Board there appears a mistaken concept of a labor organization as an entity apart from its members. Respondent is an unincorporated association of employees, and as such acts only through the will of a majority of its members. The definition of "Union"⁵ is "that which is united, or made one; something formed by a combination or coalition of parts or members, a confederation; a consolidated body; a league; as, the United States of America are often called 'the Union'." The actions of respondent in the application of Section 45 of its by-laws are merely compliance with the expressed will of a majority of the members.

Section 45 had been in effect for eight years (R. 74) and was passed after being "taken up in three of the meetings of the Union (by) * * * a majority of those who were present" (R. 71). It has been applied without discrimination as between members of that Union and "there have been many instances * * * when members have become in arrears in their dues and Section 45 of the by-laws has set up" (R. 75). Stated another way, Boston was treated in exactly the same manner as all other members were treated and the action in his case, as in all others, resulted from the will of the majority of the members as expressed in their Union by-laws. This is not a case of Union officers or agents attempting to restrain or coerce members, nor it is an instance of the type of abuse which Congress sought to remedy by including Section 8 (b) in the N. L. R. A.

⁵Webster's New International Dictionary, Second Edition.

In any discussion of this case it must be borne in mind that the Board itself has acknowledged that this by-law is not *per se* illegal.⁶

The absence of a valid Union security agreement in this case seemingly has caused the Board to mistakenly treat the Union as something entirely apart from its members and to ascribe to that separate entity a desire and intention to punish individual members who fail to maintain their dues payments in the prescribed time. This assumed intention is then followed by a further assumption, that is, that the purpose of such punishment was to encourage membership in the Union.

The illogic of such reasoning was very ably pointed out by member Murdock in his dissent (R. 18).⁷

Respondent has consistently contended before the Board and the court below that the existence of Section 45 of the by-laws would tend to discourage membership rather than encourage it. However, such discouragement is not banned by Section 8 (a) (3). As stated by Mr. Murdock "Boston was entirely free to withdraw from membership in the Union without suffering any detriment in his employment. He chose, however, to remain in the Union, subject to the Union's rules" (R. 20). (*Respondent urges*

⁶Firestone Tire & Rubber Company, 93 N. L. R. B. No. 161. There the contract between the Company and the Union contained a valid Union security clause and the Board held that since the Union could have effected the employee's discharge it did not discriminate against him by doing less, namely, effecting a reduced seniority standing.

⁷"In what respect was Boston or any other employee of the employer restrained, coerced or discriminated against? The theory of the majority perforce must be that the employer's action to execute the Union's by-law constitutes discrimination violative of Section 8 (a) (3) was calculated to 'encourage' membership in and adherence to the rules of the Union. Common sense, however, tells us that the employer's action did not encourage membership in the Union. As there is no Union-security clause compelling membership in the Union, it would be quite apparent to Boston that if he resigned from the Union he could suffer no detriment in his employment, but on the contrary, would be better off because he would no longer be subject to the Union's by-laws and subject to reduction in seniority if he fell behind in his dues payments." (Dissent of member Abe Murdock.)

this Court, as it did the court below, to study this entire dissent, as it embodies all of the contentions of respondent and succinctly states the position of the respondent on the question of whether or not reduction of the employee's seniority encouraged membership in the Union in violation of Section 8 (a) (3), and whether such actions restrained or coerced Boston in violation of Section 8 (b) (1) (A).)

The rules referred to were the rules which Boston, as a member of a group, had, by remaining a member, agreed to be bound after a majority of his fellow members had decided that such rules were to be the "law" for their group. Boston's position as No. 18 on the seniority list unquestionably had resulted from previous application, in intervening years, of Section 45, since his employer testified that in his "own company there have been many other instances where people have been, men have been reduced in seniority standing as the result of their failure to pay dues" (R. 50).

B. A finding of violation of Section 8 (a) (3) of the Act requires a finding of purpose or intention to "encourage" or "discourage" membership in a labor organization.

Neither the employer, Byers Transportation Company, nor the respondent had as a purpose or intention in the application of Section 45 of the by-laws the encouragement or discouragement of membership in respondent within the proscription of Section 8 (a) (3). Such encouragement or discouragement does not logically or impliedly flow from the parties' actions. Congress did not intend the phrase "encourage or discourage membership in any labor organization" found in Section 8 (2) (3) to encompass a factual situation such as this. Clearly, the existence of the respondent's by-law and the employer's

assistance in enforcing it would *tend to restrain* applications for membership in respondent and incite withdrawals from membership by members who were fearful of losing seniority standing. Certainly it cannot be argued that such was the type of "discouragement" that Congress had reference to in drafting Section 8 (a) (3).

This discouragement of membership arises from the fact that the by-law of respondent applies only to members of that labor organization. Therefore, employees who are not members are not affected by the by-law although covered by the seniority clause in the collective bargaining agreement. The record discloses that there is no valid union shop agreement in existence and there is nothing in the record to indicate that respondent and the employer illegally conducted an unlawful union shop arrangement. Therefore, it not being incumbent upon an employee to become a member, it logically follows that it would be to his benefit to refrain from membership and thus avoid the possibility of reduction in seniority by application of the by-law. Thus Section 45 of respondent's by-laws does not "encourage" membership. If anything, it should tend to discourage such membership when it is obvious that such membership carries with it a rather drastic penalty for failure to keep current in dues payments.

The fact that Boston remained a member after the by-laws was put into effect several years ago has no particular evidentiary value here since, so far as this record indicates, he may have had many reasons for valuing his membership in respondent and remained a member in spite of, and not because of, Section 45 of the by-laws.

A finding that respondent violated Section 8 (b) (2) must be preceded by a finding that the employer's actions were violative of Section 8 (a) (3). Assuming for the

purpose of argument, that the record of this case contains sufficient evidence of respondent having caused the employer to treat Boston's seniority as reduced because of the application of Section 45 of respondent's by-laws, respondent contends that this reduction would not result in an unfair labor practice within the meaning of the National Labor Relations Act, as amended, because it was not motivated by a desire to encourage or discourage Boston's union membership or nonmembership but rather on a nondiscriminatory by-law of respondent and the nondiscriminatory application of that by-law under the collective bargaining agreement. This is not discrimination within the meaning of the Act. The term "discrimination" as used in Section 8 (a) (3) and in the law of labor relations "refers to inequality of treatment based upon the desire of employers to discourage free employee organization for collective bargaining purposes."

Under Section 8 (a) (3) employers may not discriminate in regard to hire or tenure of employment or any term or condition of employment if such action is motivated by a desire to encourage or discourage membership in a labor organization. Employers are not prohibited, however, from any discrimination if they are not motivated by a desire to inhibit free organization. In order to hold that violation of that section has occurred, a preponderance of the evidence must establish that the discrimination was motivated by anti-union or pro-union considerations. Failing in this burden of proof, the Board may not hold that a violation of Section 8 (a) (3) has occurred. The employer is free to discourage or otherwise discipline his employees for a good cause, a bad cause or no cause at all, so long as he is not primarily motivated by anti-union considerations and so long as encouragement or discouragement of union membership or activity

will not be a direct and foreseeable consequence of the employer's conduct. This Court, in upholding the constitutionality of Section 8 (a) (3), stated:¹

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for the interference with the right of discharge when that right is exercised for other reasons, than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." *NLRB v. Laughlin Steel Corp.*, *supra*.

and that:

"We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. * * * To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining." *NLRB v. Fansteel M. Corp.*, *supra*.

It is important to remember that whatever rights Boston had, insofar as seniority was concerned, arose out of the contract between his employer and his bargaining agent, the Union. Seniority rights of employees, whether or not they are Union members, are entirely created and limited by agreements which are binding upon them. Such agreements do not create permanent rights and may be *modified* by the parties in the *general interest* of all Union mem-

¹*NLRB v. Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615; *Associated Press v. NLRB*, 301 U. S. 103, 57 S. Ct. 650; *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490.

bers. *Elder v. New York Central Railway Co.*, 152 F. 2d 361. Seniority is not an inherent, natural, or constitutional right and does not arise from mere employment independently of contract, but exists by virtue of a contract between an employer and a union, inuring through the latter to the benefit of its members or other employees covered by the agreement. *Wooldridge v. Denver & Rio Grande Western R. R. Co.* (Colo. Sup. Ct., 1948), 21 LRRM 2612. *Edelstein v. Duluth, Missabe and Iron Range Railway Co.* (Minn. Sup. Ct., 1948), 21 LRRM 2533.

There was abundant, clear, unequivocal and unrefuted testimony to the effect that the parties negotiated Section 1 of Article V of the Central States Area Agreement (R. 41), having discussed Section 45 of the by-laws of respondent and intended, when they negotiated the phrase "any controversy over the seniority standing of any employee," to include instances where employees are reduced in seniority standing because of Section 45 of the by-laws (R. A. 11, 27-31). That the parties understand and that it has been their custom and practice to interpret Section 1 of Article V of their contract to construe the phrase "any controversy over the seniority standing of any employee," as that phrase is used in such Section 1, as including instances where employees are reduced in seniority standing because of the operation of Section 45 of Respondent's by-laws, is also abundantly clear (R. A. 9, 11, 12, 14, 16, 27-31).

In *Doyle et al. v. Division No. 1127 of Amalgamated Association of Street Electric Railway & Motor Coach Employees of America et al.*, 76 F. Supp. 655, Aff., 168 F. 2d 876, it was held that a bus company met its statutory obligation by establishing the seniority of re-employed veterans as of the date they were approved as intercity extra-board operators of busses by predecessor

company, if they were so approved, and as of a specified date, if they were not so approved, in accordance with valid collective bargaining contracts. The court refused to disturb decisions of Union tribunals which settled disputes over seniority rights. In passing upon the decisions of such Union tribunals, the court said:

"The seniority rights of the nonveteran plaintiffs are in accordance with decisions of the officers and tribunals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, of which union all plaintiffs are members. Said decisions were rendered to settle the dispute over seniority rights existing within Division 1216 and after the merger of said Division in Division 1127, between the members of the former Division 1216 and Division 1127. The plaintiffs had a full and fair hearing before the tribunals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. The decisions by said tribunals were *in accordance with the constitution* of that organization; they were neither in excess of their jurisdiction, nor fraudulent, in bad faith, nor in contravention of any public policy or of the law of the land. As a matter of law, they will not be disturbed by this court."

With regard to the absence of bad faith or fraud of Boston's rights and in view of the general application of the by-laws to all members, see *Elder v. New York Central Railway, supra*.

The law is well settled that where, as here, seniority rights arise solely from a collective bargaining agreement the bargaining agent, where it acts for the benefit of all and not in bad faith or fraudulently, can change seniority provisions even though such change may adversely affect some of the employees covered by such agreement. In *Hartley v. Brotherhood of Railway and Steamship Clerks*,

283 Mich. 201, 2 LRRM 872, plaintiff, a married woman, had a number of years of seniority which she had acquired through a contract between the railroad company and the defendant union. She lost her job and, of course, her seniority rights because of an agreement of the union that married female employees be dismissed. There the railroad company informed the officers of the union that protests against the company's retention of married women in its employ were becoming so acute as to result in a serious impairment of personnel relations. Union meetings were held and a majority vote of those in attendance favored modifying the agreement to permit the discharge of married women irrespective of seniority. In passing upon plaintiff's claim that the union had breached contractual rights existing between the union and the married women, the court said:

"The purposes of the Brotherhood (union), as stated in the preamble to the constitution, are to promote unity of action and the general welfare of the members thereof. Those purposes are accomplished by the instrument of collective bargaining with the employer as to conditions of employment, etc.

"But by becoming a member of the Brotherhood, no contractual rights arose out of the constitution, statutes and protective laws which guaranteed plaintiff that no action would be taken or agreement made for the benefit of the Brotherhood *as a whole* if such action would operate to the detriment of plaintiff *as an individual*.

"The seniority rights acquired by her did not arise by virtue of her contract of employment with the employer, but existed by reason of the agreement of 1921 between the Railway and the Brotherhood. *Ryan v. New York Cent. R. Co.*, 267 Mich. 202. This agreement was executed for the benefit of *all* the members of the Brotherhood and not for the *individual* benefit of plaintiff.

"When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in *the general interest of all members* of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or *destroy* these rights in the interest of all the members.

"A different situation might be presented had the agreement of 1932 been accomplished as a result of bad faith, arbitrary action, or fraud directed at plaintiff on the part of those responsible for its execution. No claim or showing of such a nature is made in this case."

The Supreme Court of Missouri in the case of *Williams v A. T. & S. F. Railway Co.*, 204 S. W. 2d 693, held that one employed by a railroad as a fireman acquired a seniority right by virtue of the collective bargaining agreement between the railroad and its firemen and in doing so accepted all the conditions attached thereto, including the methods prescribed for settling disputes. The court cited in support of that finding a decision of this Court in *Elgin J. & E. R. Co. v Burley*, 327 U. S. 661, 66 S. Ct. 721. In the latter case, this Court in passing upon the question as to whether the collective bargaining agent had authority to finally settle an aggrieved individual employee's claim said:

"The question whether the collective agent has authority, in two pertinent respects, does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are dealing here with problems in a specialized field, with a long

background of custom and practice in the railroad world."

and that:

"Furthermore, so far as union members are concerned, and they are the only persons involved as respondents in this cause, it is altogether possible for the union to secure authority in these respects within well-established rules relating to unincorporated organizations and their relations with their members, by appropriate provisions in their *by-laws*, constitution or other governing regulations, as well as by usage or custom."

In the case now before this Court the respondent first secured from its members the authority to bargain regarding a reduction in their seniority. After obtaining this authority, according to the evidence in this case, the respondent by contract with the employer obtained the right to determine all questions of seniority standing; including the right to reduce the seniority standing only of its members when they became in arrears in union dues.

There is nothing in the legislative history of Taft-Hartley to indicate that Congress intended to interfere with or instruct unions in their bargaining for or actions under seniority systems.

In conjunction with the issue of "superseniority" there arose a question as to whether or not Union officials such as shop stewards who by union contract were given "top-seniority" could retain their jobs if returning veterans were laid off during the first year of their re-employment. The court in passing upon *Gauweiler v. Elastic Stop Nut Corp.*, 162 F. 2d 448, 20 LRRM 2140, said:

"Let us consider briefly what our employee's seniority rights would have been, had he remained con-

tinuously employed in the plant, without having been called away to war service. He would, of course, have his rights fixed as to seniority, working conditions, pay, and all the rest, by terms of the contract entered into between the recognized bargaining agent and the employer. Furthermore, the terms of such contract would have been the measure of his rights whether he was, himself, a member of the bargaining union or not. That is one of the incidents which results from the collective bargaining practice carried on by the bargaining agent designated by the majority and is indeed no more than the application in the industrial world of what we all experience in the world of public affairs.

"In entering into labor contracts, the bargainers must make their agreements with a view to the rights of the entire group bound by them, and not enter into agreements which discriminate against one part for the benefit of another. The provision for top or preferred seniority for union officers and other officials is neither uncommon nor arbitrary. It may add a pleasant emolument to a particular union office, but it also provides what union members may well consider a highly essential matter: that is, to have their own representatives on the job to look after their interests, so long as work is being done in the plant.

"It is to be emphasized that in our case there is no suggestion of discrimination against veteran-employees. The significance of that point was mentioned by the Supreme Court in the Trailmobile case (7 U. S. S. Ct. Bull. 1547, at 1565 (19 LRRM 2531). Discrimination would, obviously, change the whole picture. If, during the absence of some of the employees at war, those remaining got together and created union offices for themselves so that everyone had an office, and then proceeded to provide top seniority for union officers, a court would have no trouble in seeing that this device was simply an effort

to discriminate against absent fighting men. No such point is involved in the problem before us. * * *

See also *Koury v. Elastic Stop Nut Corp.*, 162 F. 2d 544, 20 LRRM 2145; *DiMaggio v. Elastic Stop Nut Corp.*, 162 F. 2d 546, 20 LRRM 2146. The Court's attention is directed to the fact that here again the lack of discrimination was deemed significant.

The members, or at least a majority of them, of respondent apparently considered the current payment of dues as "a highly essential matter" since they attached the penalty of loss of seniority for failure to pay within the month.

C. The actual question on which certiorari was granted was: Must the record as a whole before the United States Court of Appeals contain substantial evidence to support a conclusion that discrimination in regard to the tenure or condition of employer of an employee did or would encourage or discourage members in a labor organization.

As heretofore pointed out, Section 8 (a) (3) of the National Labor Relations Act is violated only if there is a discrimination from which an encouragement of Union membership naturally and proximately follows. The petitioner has broadened the scope of that section so as to make it encompass a far greater meaning than Congress ever intended. The idea that any assistance or cooperation by an employer in the application of a Union's rule to employees who are members of the Union and who do not intend to refrain from such membership and its concomitant benefits and liabilities violates the Act is an enlargement of the plain wording of Section 8 (a) (3).

The court below correctly followed the applicable law and stated: "The rule to be applied by this court in determining the validity of the Board's finding is set out in

Par. 10 (e) of the National Labor Relations Act as amended in 1947 by the Labor Management Relations Act, known as the Taft-Hartley Act (61 Stat. 148, 28 U. S. C., Supp. III, Par. 160 (e)). This section reads: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' See *Universal Camera Corp. v. Labor Board*, 340 U. S. 474; *Labor Board v. Pittsburgh Steamship Co.*, 340 U. S. 498 (R. 94), and that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 229. Quoted in *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 477. It 'must do more than create a suspicion of the existence of a fact to be established.' *Labor Board v. Columbian Enameling & Stamping Co.*, 305 U. S. 292, 300."

After the court below found there was no basis for the petitioner's finding that the employer discriminated against Boston in violation of Section 8 (a) (3) of the National Labor Relations Act, it further found that the record in this case is absolutely barren of any evidence at all that the employer's actions encouraged or discouraged membership in a labor organization within the meaning of Section 8 (a) (3). The court then cited the respondent's contention with respect to *N. L. R. B. v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), in which that court said:

"Even if we should assume that the disparity brought about by the retroactive payments amounted to discrimination, then, under the statutory language, *we must go further and ascertain* whether that discrimination encouraged membership * * * in the Newspaper and Mail Deliverers' Union of New York and

vicinity. And we do not find substantial evidence of that encouragement. * * *."

"* * * While our decision in *Quaker State Oil Refining Corp. v. National Labor Relations Board*, 119 F. 2d 631 (4 Labor Cases, para. 60, 435), had to do with alleged 8(3) violations which arose out of the actions of employees, the underlying thought of that case is quite material here. We there said at page 633: 'It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union.' See also *National Labor Relations Board v. Public Service Co-Ordinated Transport*, 3 Cir., 177 F. 2d 119 (17 Labor Cases, para. 65,322).

"Generally speaking, the proposition that in order to establish an 8(a)(3) violation there must be evidence that the employer's act encouraged or discouraged union membership has widespread support. In *National Labor Relations Board v. Air Associates, Inc.*, 2 Cir., 121 F. 2d 586 (4 Labor Cases, para. 60,587, 60,716), the court held at page 592: 'Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership.' The later decision in that same circuit, *National Labor Relations Board v. Cities Service Oil Co.*, 129 F. 2d 933, 937 (6 Labor Cases, para. 61,147), in no way restricted that language. In *Stonewall Cotton Mills, Inc., v. National Labor Relations Board*, 5 Cir., 129 F. 2d 629 (5 Labor Cases, para. 61,099), the Board had found certain lay-offs and discharges to have been in violation of Section 8(3). The court said at page 632: 'To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization.' This conclusion was not disturbed by the motion for rehearing (129 F. 2d 633)

which was disposed of entirely upon evidential grounds. To the same effect see *Western Cartridge Co. v. National Labor Relations Board*, 7 Cir. 139 F. 2d 855, 859 (7 Labor Cases, para. 61,095, 61,967); *National Labor Relations Board v. Reynolds International Pen Co.*, 7 Cir., 162 F. 2d 680, 690 (13 Labor Cases, para. 63,872); *Wells, Inc., v. National Labor Relations Board*, 9 Cir., 162 F. 2d 457, 459, 460 (12 Labor Cases, para. 63,848); *National Labor Relations Board v. Robbins Tire and Rubber Co., Inc.*, 5 Cir., 161 F. 2d 198, 801 (12 Labor Cases, para. 633,776).

"As above indicated, we find no substantial evidence in the record to justify the Board's holding that respondent had violated Section 8(a) (3) of the Act. * * *"

Citing this Court's decision in *NLRB v. Fansteel M. Corp.*, *supra*, the Court of Appeals, 9th Circuit, in *NLRB v. Potlatch Forests*, 189 F. 2d 82, 85, said:

"Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Section 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose."

and found that:

"Potlatch has exhibited no anti-union prejudice and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.

"There has been no discrimination between union and non-union employees on the basis of union membership."

The indential situation is present here in that Byers Transportation Company, as between the union members

group of employees, has allowed them to make their own determinations of seniority and did not discriminate between its union and nonunion members.

Again in *Western Cartridge Co. v. NLRB*, 139 F. 2d 855, the Seventh Circuit Court of Appeals said:

“Without violating Section 8(3) of the Act, the company had a right to discharge these (striking) employees or to refuse to take them back into its employ as long as it did not discriminate against them in such a manner as *to encourage or discourage membership in any labor organization*. (Court emphasis.) * * * Under Section 8(3) of the Act to constitute the unfair labor practice of discrimination, the discrimination with regard to hire and tenure must have the purpose ‘to encourage or discourage membership in any labor organization.’

“The Board has found discrimination because of concerted activities. We think there is evidence to support such findings. We must go one step further. Was that discrimination to encourage or discourage membership in any labor organization? * * * Without bothering to point out any evidence to support a finding that such discrimination was *for the purpose of encouraging or discouraging membership in any labor organization* (court emphasis), the Board finds such discrimination ‘thereby discouraged membership in the Union, etc.’

“We are unable to find in the record any substantial evidence to support a finding that the Company’s acts toward its striking employees in the matter of their hire and tenure were taken to discourage membership in a labor organization. * * *

“We recognize the exclusive right of the Board to draw inferences but there must be some evidence from which the inference can be drawn.”

Disposing of an additional, separate, individual finding of Section 8(3) violation, the court also said:

“This finding shows only that the Company discharged Groessman for a reason that did not exist in fact. Does it therefore follow as a reasonable inference that Goessman was discharged in order to discourage his membership in a labor organization? * * * We think there is not substantial evidence to support the Board’s finding as to Groessman.”

To the same effect see also the decisions of the Eighth Circuit in the case of *N. L. R. B. v. Webb Construction Company*, 196 F. 2d 702, 30 L. R. R. M. 2125, in which the court said:

“There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. * * * Nothing in the National Labor Relations Act prevented a Union from adopting rules of its own as to distribution of work among its members. No one is required to join the Union and subject himself to such rules and regulations; neither is there any inhibition against *his withdrawing from the Union* if such rules and regulations are not satisfactory to him^a. We conclude that the termination of Pickard’s employment did not reasonably tend to encourage membership in respondent Union or to discourage membership in Local 101-B within the purview of the National Labor Relations Act.” (Citing the *Reliable Newspaper Delivery, Inc.*, *Winona Teytile Mills*, *Potlatch Forests*, and *Western Cartridge Company* cases, *supra*.)

^aA situation which is exactly analogous to that of the instant case.

D. A finding of Section 8 (b) (2) violation must be predicated upon a finding of violation of Section 8 (a) (3).

The court below found that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure * * * or condition of employment,'" and that "this was a violation of Section 8 (b) (2) of the Act." *Respondent cannot agree with this latter statement.* There is nothing in this record that would tend to establish that the application of Section 45 to Boston's seniority standing was motivated by his support of any other Union or his efforts to undermine respondent or that such by-law was of the "indefensible" variety. Cf. *N. L. R. B. v. Elk Lumber Company*. 91 N. L. R. B. 333.

On the contrary, had the respondent treated Boston in any manner other than it did it would have been guilty of discriminatory treatment of its other members employed by Byers Transportation Company who had, as did Boston, agreed to be bound by Section 45 and many of whom had in the past been adversely affected by the application of that section to their seniority standing. The respondent, therefore, was, if the Board's theory is correct, in a dilemma from which it could not extricate itself. Only Boston had the means of extricating respondent from the situation, and that by simply withdrawing from membership.

The Board's theory appears to be that membership in a labor organization, at least within the purview of Section 8 (a) (3), includes the benefits and liabilities incidental to that membership, and also includes good standing based on the faithful performance of membership obligations. Further, the Board says that the respondent's action, having been in conformance with one of its by-laws, en-

couraged membership in respondent inasmuch as it encouraged compliance with its by-law. This theory is extremely untenable since there is nothing in the legislative history of the Act which even tends to show that Congress had any such thing in mind in phrasing Section 8 (a) (3). Nowhere does it appear that Congress intended that after a member of a labor organization had voluntarily accepted the obligations of membership the Union could be prosecuted under Section 8 (b) (2) for nondiscriminatory, as between members, application of its membership rules. In fact, by the proviso to Section 8 (b) (1) a contrary intention is indicated.

Conclusion.

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

CLIF. LANGSDALE

JOHN J. MANNING,

928 Scarritt Building,

Kansas City, Missouri,

Attorneys for Respondent.

INVESTIGATION OF THE ACTS OF THE
WASHINGTON & ANNE ARUNDEL COUNTY
AND DISTRICT OF COLUMBIA
WASHINGTON, D. C. MAR 24, 1914.

On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit.

REPLY BRIEF.

CLAY LAWRENCE,
JOHN J. MANNING,
923 Scarritt Building,
Kansas City, Missouri,
Attorneys for Respondent.

In the Supreme Court of the United States

October Term, 1952.

No. 301.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD
AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN AND
WAREHOUSEMEN, LOCAL UNION No. 41, A. F. L., *Re-*
spondent.

*On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit.*

REPLY BRIEF.

Question Involved.

Must the National Labor Relations Board produce "substantial evidence" of the fact that "the act of the Union encourage(d) or discourage(d) other employees who might¹ learn what had been done."

¹Throughout this brief emphasis is supplied unless otherwise indicated.

ARGUMENT.

I.

Congressional history demonstrates validity of lower courts' ruling regarding necessity for "substantial evidence."

During the Wagner Act period there were numerous decisions of various Circuit Courts of Appeal to the effect that there must be some evidence of the "effect" of encouragement or discouragement resulting from intentional discrimination. Those courts held that Section 8 (3) of the original act called for evidence of (1) a "purpose" and (2) an "effect" of encouragement or discouragement of membership within the meaning of that section. A number of those rulings were cited by the 3rd Circuit in *N. L. R. B. v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (see excerpt from that opinion quoted in respondent's original brief at page 25).

In fact, it was the decisions of this Supreme Court and other courts to the contrary and to the effect that evidence of such fact was not required, but instead that the Board by reason of its "expertness" was entitled to assume and infer the fact of discouragement or encouragement—it was precisely such decisions that prompted Congress to amend Section 10 (e) and provide that there must be substantial evidence of such fact. It is often difficult to determine with any certainty just what Congress intended by particular phraseology but in this instance such is not the case. The background for the provision in Sec. 10 (e) of the National Labor Relations Act that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evi-

dence on the record considered as a whole is stated in the *House Conference Report No. 510 on H. R. 3020*.²

"Under the language of Section 10 (e) of the present act, findings of the Board, upon court review of Board orders, are conclusive 'if supported by evidence.' By reason of this language, the courts have, as one has put it, in effect 'abdicated' to the Board. (*NLRB v. Standard Oil Co.*, 138 Fed. (2d) 885 (1943)). See also: *Wilson & Co. v. NLRB* (126 Fed. (2d) 114 (1942)), *NLRB v. Columbia Products Corp.* (141 Fed. (2d) 687 (1944)), *NLRB v. Union Pacific Stages, Inc.* (99 Fed. (2d) 153). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (*NLRB v. Hearst Publications, Inc.*, 322 U. S. 111; *NLRB v. Packard Motor Car Co.*, decided March 10, 1937), or when they rested only on inferences that were not, in turn, supported by facts in the record (*Republic Aviation v. NLRB*, 324 U. S. 793; *LeTourneau Co. v. NLRB*, 324 U. S. 793)."

* * * * *

"The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. * * * This is not to say that the courts will be required to decide any case *de novo* themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without

²Legislative History of Labor-Management Relations Act of 1947, pps. 559, 560.

adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.* It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105), and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, supra*, without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act."

and in 93 *Congressional Record* 4560, May 2, 1947, we find:

"Mr. Taft: If in the law we require substantial evidence on the entire record, then it seems to be that we not only meet the abuses of the past against employers, but make it infinitely more difficult to use the law improperly against the labor unions."

Notwithstanding the obvious repudiation by Congress of the rationale of the Republic Aviation case, the Petitioner still depends for support of its ruling upon that case and states in its brief that

"The Court below holds, however, that it is not enough reasonably to infer the consequences from the character of the discrimination; independent evidence must be introduced to establish an actual manifestation of the forbidden effect (R. 93-95). But as this Court has held, in rejecting a contention that 'there must be evidence * * * to show that (conduct) * * * interfered with and discouraged union organization,' the requirement of proof necessitates only 'the production of evidential facts'; it does not 'com-

pel evidence as to the results which may flow from such facts.' *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, 800. The Board 'may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven,' and the inference drawn carries the authority of a conclusion 'made by experienced officials with an adequate appreciation of the complexities of the subject entrusted to their administration' (*ibid.*, at p. 800)."

The Republic Aviation case, *supra*, concerned the discharge of an employee because he persisted, after being warned of a rule against soliciting of any type, in passing out application cards on his own time in the plant. This Court stated the contention of the Petitioner in that case as

"The gravamen of the objection of both Republic and LeTourneau to the Board's orders is that they rest on a policy formulated without due administrative procedure. To be more specific, it is that the Board cannot substitute its knowledge of industrial relations for substantive evidence. The contention is that there *must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company.*" 65 S. Ct. 985,

but held that an administrative agency "may infer within the limits of the proven facts such conclusions as reasonably may be based upon the facts proven," and endorsed the Board's expression of its power to indulge in the presumption that a rule prohibiting solicitation "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory. *Re Peyton Baking Company*, 49 NLRB 828, l. c. 843."

Therefore, upholding the Board's claim of authority to presume such facts, this Court also held that this rule discriminated within the meaning of Section 83 "in that it *discourages membership in a labor organization.*" The analogy of the Republic Aviation case with the case now before the Court differs only in that the Board here contends that the conduct complained of "encouraged" membership, which is a difference without a distinction.

A footnote contained in the above quoted portion of Petitioner's Brief contains reference to the assertion by this Court in *Universal Corp. v. NLRB*, 340 U. S. 474, 488, that the amended act does not "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." It appears that this assertion of the Court, while generally true, is, however, in the particular circumstances of this case by its analogy to Republic Aviation precluded by legislative fiat.³ Further, while footnote 22 in the *Universal Camera Corp.* case states:

"The sufficiency of evidence to support findings of fact is *not* involved in the three other decisions of this Court to which reference was made. *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111; *Republic Aviation Corp. v. NLRB*, 324 U. S. 793."

Such statement appears factually in conflict with the court's outline of the gravamen of Republic Aviation's contention and the statement of facts and conclusions of

³House Conference Report No. 510, *supra*.

law contained in the opinion in that case as heretofore quoted.⁴

II.

Even though the Board may indulge in inference the particular inference in this case is not warranted.

If inferences of the fact of encouragement or discouragement of membership are to be permitted *generally* the Respondent feels that in this matter a much stronger case can be made for the inference that instead of encouraging employees to join the Union, the acquiescence of the employer in the application of Section 45 of Respondent's by-laws would more logically tend to cause employees to refrain from membership. The logic of the latter inference arises from the fact that employees were not compelled to join the Union, and since Section 45 applies only to members, employees realizing that membership involved risk of loss of seniority standing would avoid such risk by abstaining from membership. It is true that such logical argument may appear illogical when contrasted with the usual Union view that all employees should become members of a labor organization. However, the test of whether that argument is or is not logical in the light of the general position of labor organizations, cannot properly be evaluated here, since the record in this case does not contain the facts which motivated a majority of the Respondent's members to adopt the particular by-law in question.

Further, Respondent asserts that in the light of the facts of this case there is no necessity for the Board's

⁴*Universal Camera Corp. v. NLRB*, 340 U. S. 474, 486, 71 S. Ct. 456, 463. This Court had reference to the fact that Congress in the House Report, *supra*, had cited the decisions in the three cases as the type of rulings it was seeking to avert by legislative enactment.

"expertize," but that instead, as member Murdock put it, "common sense, however, tells us that the employee's action would not encourage membership in the Union." It does not require an expert to apply "common sense" to the only possible inference that could arise from the facts in this record.

III.

Petitioner's view of the phrase "membership" as used in the act is unimportant in this case.

Regarding the Petitioner's claim that "membership" as used in the act includes "incidents of membership" such as "good standing" Respondent is not required to answer whether, generally speaking, that might or might not be true, but contents itself with the statement that for the purpose of this case it makes no difference if that be true or false, because here there was *no contract requiring membership of any degree* either good or bad standing. As Petitioner stated in its brief on page 23,

"Thus, the House Report stated (H. Rep. No. 245, 80th Cong., 1st Sess., 32):

"* * * if the suspension or expulsion results from anything other than nonpayment of initiation fees and dues * * *, the union may not require an employer to discharge the member *under an agreement * * * making union membership a condition of employment,*"

and again on page 24,

"The Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 20-20):

"It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or

other job discrimination against, an employee except in the two situations described. Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job *because of a contract requiring membership* as a condition of employment."

IV.

Right of an employee to refrain from concerted activities mentioned in Section 7 of the act.

The right of an employee to refrain from the activities mentioned in Section 7 of the act is not an "inalienable" right, at least insofar as the ability of the employee himself is concerned. He can, as did the employee in the case before this Court, legally and morally bind himself to waive this right of refraining, and having done so he cannot be heard to complain nor can anyone complain for him.

Respectfully submitted,

CLIF LANGSDALE,
JOHN J. MANNING,
922 Scarritt Building,
Kansas City, Missouri,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit.....	1	1
Appendix to brief for petitioner	1	1
Petition for enforcement of an Order of the National Labor Relations Board	1	1
Appendix "A"—Form of Notice to all employees pursuant to a decision and order	6	5
Proceedings before National Labor Relations Board ..	9	7
Decision and order	9	7
Appendix "A"—Form of notice to all em- ployees pursuant to a decision and order (copy) (omitted in printing)	16	
Intermediate Report	19	12
Statement of the case	19	12
Findings of fact	25	17
Conclusions of law	50	38
Recommendations	51	39
Appendix "A"—Form of notice to all employees pursuant to the recommen- dations of a trial examiner	55	42

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAR. 19, 1953.

Appendix to brief for petitioner—Continued

Proceedings before National Labor Relations Board—
Continued

Intermediate Report—Continued

	Original	Print
Transcript of hearings of July 17, 18, 19, 1950	58	44
Appearances	58	44
Proceedings	59	44
Offers in evidence	60	45
Testimony of—		
James B. Gaynor	70	54
Dominick Santomenna	75	58
Leon Asche	76	59
Sheldon Loner	87	68
James B. Gaynor (recalled)	88	70
General Counsel's Exhibits 1A & 1D—		
Charge against Employer and Amended		
Charge against employer	93	74
General Counsel's Exhibit 1H—Com-		
plaint	97	78
General Counsel's Exhibit 1M—Answer	102	81
General Counsel's Exhibit 1-O—Amend-		
ment to Paragraph 10 of the Com-		
plaint	105	83
General Counsel's Exhibits 4A & 4B—		
Petition and withdrawal request in Case		
No. 2—UA-5448	106	84
General Counsel's Exhibits 9A & 9B—		
Petition and withdrawal request in		
Case No. 2-UA-4273	110	88
General Counsel's Exhibit 2—Contract		
between Gaynor News Company, Inc.		
and Newspaper and Mail Deliverers'		
Union of New York and Vicinity dated		
October 25, 1948	114	91
Respondent's Exhibit 2—Supplementary		
agreement dated October 18, 1948	118	95
Respondent's Exhibit 1—Contract be-		
tween Gaynor News Company, Inc.,		
and Newspaper and Mail Deliverers'		
Union of New York and Vicinity,		
dated January 2, 1946	121	97
Stipulation	127	101
Supplementary agreement between Gaynor		
News Company, Inc. and the Newspaper		
and Mail Deliverers' Union of New York		
and Vicinity dated October 9, 1947	128	101

INDEX

iii

	Original	Print
Appendix to brief for respondent.....	131	103
Answer to petition for enforcement.....	131	103
Excerpts from testimony.....	133	104
Testimony of—		
James B. Gaynor (resumed).....	133	104
Leon Braunstein.....	134	105
Sheldon Loner.....	135	106
James B. Gaynor (recalled).....	139	110
Sheldon Loner (recalled).....	149	118
Opinion, Frank, J.....	153	121
Opinion, Chase, J. (concurring in part and dissenting in part).....	160	128
Decree.....	161	129
Appendix "A"—Form of notice to all employees pursuant to a decree of the U.S.C.A. enforcing as modified, an order of the National Labor Relations Board, etc.....	163	131
Clerk's certificate.....(omitted in printing) ..	164	
Order allowing certiorari.....	165	133

BLEED THROUGH- POOR COPY

[fol. 1]

**IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GAYNOR NEWS COMPANY, INC., Respondent

Appendix To Brief For Petitioner

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD.—February 19, 1952

To the Honorable, the Judges of the United States Court
of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Gaynor News Company, Inc. and Sheldon A. Loner and Newspaper & Mail Deliverers' Union of New York and Vicinity, Party to the Contract, Case No. 2-CA-605."

In support of this petition the Board respectfully shows:

(1) Respondent is a New York corporation engaged in business in the State of New York, within this judicial [fol. 2] circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on February 16, 1951, duly stated its findings of fact and conclusions

of law, and issued an order directed to the Respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any terms or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

(d) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner and all other non-union employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report in the section entitled "The remedy."

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this order.

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix [fol. 5] A.⁷ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On February 16, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript [fol. 6] to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board; and requiring Respondent,

⁷ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

and its officers, agents, successors, and assigns to comply therewith.

National Labor Relations Board, By (S.) A. Norman Somers, Assistant General Counsel.

Dated at Washington, D. C. this 19th day of February 1952.

APPENDIX A

Notice to all Employees

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discriminating in regard to their hire and tenure of employment, or any term or condition of employment of any of our employees because of their non-membership in such organization.

[fol. 7] We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or

to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as a representative of any of our employees for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the National Labor Relations Board.

[fol. 8] We will cease performing or giving effect to our contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board.

We will make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer)

Dated — — By (Representative, (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 9] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-CA-605.

In the Matter of GAYNOR NEWS COMPANY, INC. and SHELDON
A LONER, and NEWSPAPER & MAIL DELIVERERS' UNION OF
NEW YORK and VICINITY, Party to the Contract

DECISION and ORDER.—February 16, 1951

On October 19, 1950, Trial Examiner Sydney S. Asher issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and supporting brief.

[fol. 10] The Board¹ has reviewed the Trial Examiner's rulings made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed.² The

¹ Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

² While we agree that the Trial Examiner properly rejected the Respondent's offer to prove that Loner, the charging party, made the Board his tool in his attempt to obtain membership in the Union, we do not adopt his categorical conclusion that "the motives of the charging party, 'however evil or unlawful,' are immaterial." Although the underlying motives of the charging party cannot deprive the Board of its jurisdiction to proceed after the filing of the charge, his motives may be material on the question of the Board's discretion to accord the charging party the protection of the Act if it feels that its processes are being abused. *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9. However, even assuming Respondent were able to prove that Loner was motivated as contended, we do not consider that it would be in the public interest to fail to remedy the Respondent's unfair labor practices here found.

Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case,³ and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following additions and modifications.⁴

1. The Trial Examiner found that neither the January 2, 1946, contract nor the supplementary agreement dated August 22, 1946, between the Respondent and the Union required the Respondent to make retroactive wage payments to *any* of its employees, and he therefore rejected [fol. 11] the Respondent's contention that it made such payments under the compulsion of a legally binding agreement. He further found that even assuming that the 1946 contract required these retroactive payments to union members, the Respondent was nevertheless not precluded from making equal payments to nonunion employees. Following the issuance of the order transferring the case from the Trial Examiner to the Board, the parties by stipulation⁵ agreed to incorporate in the record as additional evidence a copy of a second supplementary agreement entered into between the Respondent and the Union on October 9, 1947,

³ The Respondent's request for oral argument is hereby denied, as the exceptions and brief and the record, in our opinion, adequately present the issues and the positions of the parties.

⁴ As we agree with the Trial Examiner's construction of Section 17 of the October 25, 1948, contract and as the record contains no other evidence that the contracting parties had agreed in writing to defer application of the contract's illegal union-security provision, we find it unnecessary to adopt the further reasoning of the Trial Examiner set forth in footnote 37 of the Intermediate Report.
93 NLRB No. 36.

⁵ The stipulation, dated November 29, 1950, provides that the document attached thereto is a copy of the supplementary agreement entered into by and between the Respondent and the Union on October 9, 1947, amending the January 2, 1946, contract then in effect, and that the same be made a part of the record in this proceeding.

which further amended the January 2, 1946, contract by providing *inter alia*:

In the event that the parties enter into a new written contract effective from the expiration of the existing contract which new contract shall expire no earlier than three months after the effective term of any new written contract which the Union may enter into with the Publishers' Association of New York City, then and in such event, the wage rates provided in such new contract between the parties hereto shall be applicable retroactively for the last three months of the present existing contract between the parties hereto in lieu and instead of the wage rates provided in the present existing contract between the parties hereto for the said three months period.

[fol. 12] While this new evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract, it does not affect the validity of the Trial Examiner's basic conclusion, with which we agree, that the contract affords no defense to the allegation that the Respondent unlawfully engaged in disparate treatment of employees on the basis of union membership or lack of it, as there is nothing in the supplemental agreement of October 9, 1947, which prohibits equal payments to nonunion employees.⁶

2. Unlike the Trial Examiner we are not persuaded that the Respondent's past conduct as revealed by the record in this case is indicative of a predilection to commit other unfair labor practices in the future. We shall therefore not adopt his recommended broad cease and desist order but shall order the Respondent to cease and desist only from engaging in the unfair labor practices found and any like or related conduct.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the

⁶ *Reliable Newspaper Delivery, Inc.*, 88 NLRB No. 135.

Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other [fol. 13] labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended. [fol. 14] (d) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of its employees for the pur-

poses of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner and all other non-union employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report in the section entitled "The remedy."

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, [fol. 15] time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this order.

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix A.⁷ Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicu-

⁷ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the word, "A Decree of the United States Court of Appeals Enforcing."

ous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., February 16, 1951.

Paul M. Herzog, Chairman, Abe Murdock, Member,
Paul L. Styles, Member, National Labor Relations
Board. (Seal.)

[fols. 16-18]

APPENDIX A.

Notice to all Employees

Omitted. Printed side page 6 ante.

[fol. 19]

INTERMEDIATE REPORT

Before the National Labor Relations Board, Division of
Trial Examiners, Washington, D. C.

[Title omitted]

Messrs. Merton C. Bernstein and Jerome A. Reiner, for
the General Counsel.

Bandler, Haas & Kass, by Messrs. Julius Kass and
Richard L. Halpern, of New York, N. Y., for the Respond-
ent.

Mr. Samuel Duker, of New York, N. Y., for the Union.

Statement of the Case.

Upon amended charges duly filed by Sheldon A. Loner,
[fol. 20] an individual, the General Counsel of the Na-
tional Labor Relations Board,¹ by the Regional Director
of the Second Region (New York, New York), issued a

¹ The General Counsel and his representative at the hear-
ing are referred to as the General Counsel. The National
Labor Relations Board is referred to as the Board.

complaint dated June 13, 1950, against Gaynor News Company, Inc., Mount Vernon, New York, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3), and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, the amended charge, the complaint, and the notice of hearing were duly served upon the Respondent and upon Newspaper & Mail Deliverers' Union of New York and Vicinity, herein called the Union.

In substance, the complaint alleged that: (1) on October 25, 1948, the Respondent instituted an increased wage rate and other benefits for its employees in certain described categories; (2) in October or November 1948, the Respondent paid each of its employees in the said categories who was a member of the Union retroactive wages from July to October 1948, and has failed and refused to pay similar retroactive wages to each of its employees in the said categories who was not a member of the Union, including Sheldon A. Loner; (3) in October or November 1948, the Respondent granted each of its employees in the said categories who was a member of the Union a vacation with pay or the equivalent pay, and has failed and refused to grant a similar vacation with pay or the equivalent pay to each of its employees in the said categories who was not a member of the Union, including Sheldon A. Loner; (4) on [fol. 21] October 25, 1948, the Respondent and the Union entered into a collective bargaining agreement covering the Respondent's employees in the said categories which required membership in the Union as a condition of continued employment; and (5) the said agreement is invalid and in violation of the Act.

The Respondent duly filed its answer which, in effect, admitted certain facts with respect to commerce, admitted that on or about October 25, 1948, it increased wages and other benefits for its employees in certain categories, admitted that in October or November 1948, it paid retroactive wages to each employee in the said categories who was a member of the Union and has failed to make similar payments to each of *each of* its employees in the said

categories who was not a member of the Union, including Loner, admitted that in October or November 1948, it granted retroactive vacation benefits to each of its employees in the said categories who was a member of the Union and has failed to grant similar vacation benefits to each of its employees in the said categories who was not a member of the Union, including Loner, admitted that it had executed a contract with the Union, but denied the invalidity of the contract, and denied the commission of any unfair labor practices. The Union likewise filed an answer in which it made substantially similar admissions and denials, except with respect to certain facts concerning commerce. With respect to certain commerce facts, the Union denied knowledge or information sufficient to form a belief. As an affirmative defense, the Union alleged, in effect, that the Union had filed with the Board's Regional Director for the Second Region a petition for authority to bargain [fol. 22] with respect to union security, and that the said Regional Director arbitrarily, unreasonably, and in derogation of law, had refused to entertain the said petition.

Pursuant to notice, a hearing was held on July 17, 18, and 19, 1950, at New York, New York, before Sydney S. Asher, Jr., the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the outset of the hearing, the Respondent moved to bar one of the attorneys for the General Counsel from participation, on the ground that he was serving without compensation and was therefore not an employee of the Board. The motion was denied.² The Union moved to in-

² The records of the Board, of which I have taken judicial notice, indicated that the attorney in question was clothed with full authority to represent the General Counsel in this case. The fact that he was serving without compensation is immaterial. Section 4 (a) of the Act provides: "The Board may * * * utilize such voluntary and uncompensated services, as may from time to time be needed."

tervene. The motion was granted, but the right of the Union to intervene was restricted to the question of the legality of the contract between the Union and the Respondent. The Respondent's motion to bar the Union from further participation in the hearing was denied.³ The Union moved to amend its answer with respect to certain formal statements therein. Without objection, the motion was granted.

[fol. 23] The General Counsel moved to amend the complaint by adding allegations that the contract of October 25, 1948, in addition to requiring membership in the Union as a condition of continued employment, "otherwise provided for the preferential treatment of Union members," and that the said contract is still in full force and effect. The motion was granted. The Respondent moved to dismiss so much of the complaint as alleged the execution of an illegal contract on October 25, 1948, on the ground that the charge referring to the contract was filed and served more than 6 months after the alleged date of the execution of the contract. The motion was denied. This ruling will be discussed hereafter. The Respondent further moved to dismiss so much of the complaint as referred to the contract of October 25, 1948, on the ground that there was a fatal variance between the pleadings and the proof. Ruling on this motion was reserved. It is hereby denied, for reasons discussed below.

The Union moved to dismiss the complaint on the ground that the contract showed on its face that it was not illegal. Ruling on this motion was reserved. It is hereby denied, for reasons discussed below.

The General Counsel moved to strike that part of the Union's answer which alleged as an affirmative defense that the Union had filed a petition for authority to bargain with respect to union security and that the Board's Regional Director had arbitrarily refused to entertain the petition.

³ During the course of the hearing, the Respondent made four other similar motions based, in part, upon the absence of the Union's attorney from some of the sessions of the hearing. All such motions were denied.

Ruling was reserved on this motion. It is hereby denied.⁴ [fol. 24] During the course of the hearing, the Respondent orally moved that the Trial Examiner disqualify himself because of exhibited bias and prejudice, on the ground that the Trial Examiner had consistently made rulings which had no basis in law. The motion was denied.⁵ The Respondent also moved to quash a subpoena served upon it, requiring it to produce certain records. The motion was denied.⁶

At the close of the General Counsel's case-in-chief, the Respondent made three motions to dismiss the complaint. Ruling on these motions was reserved. They are disposed of herein.

At the close of the hearing, the General Counsel moved to amend the complaint as to all formal matters. In the absence of objection, the motion was granted. The Respondent made three additional motions to dismiss the complaint. Ruling on these motions was reserved. They are disposed of herein. All parties were afforded an opportunity to present their contentions orally upon the record. The General Counsel and the Respondent did so. All parties were granted time after the close of the hearing to file briefs and/or proposed findings of fact and conclusions

⁴ As the Union introduced no evidence to support its affirmative defense, the denial of the General Counsel's motion to strike the affirmative defense cannot substantially affect the rights of any of the parties.

⁵ *West Texas Utility Company, Inc.*, 85 NLRB 1396 (footnote 2 therein) enforced, F. 2d (C.A.D.C.), July 10, 1950, 26 LRRM 2359. The Respondent did not support its motion by any affidavits "setting forth in detail the matters alleged to constitute grounds for disqualification," as required by Rules and Regulations of the Board—Series 5, as amended, Section 203.37.

⁶ The Respondent's motion to quash the subpoena was made orally, and more than 5 days after the service of the subpoena. Rules and Regulations of the Board—Series 5, as amended, Section 203.31 (b), provides that such motions shall be made *in writing within 5 days after service of the subpoena*.

of law. The Respondent has submitted a brief which has been considered.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

[fol. 25]

Findings of Fact

I. The Business of the Respondent ⁷

The Respondent is a New York corporation, with its principal office and place of business in Mount Vernon, New York. It is engaged in the business of the purchase, sale, and wholesale distribution and delivery of newspapers, magazines, and other periodicals to retail stands. During the year ending January 1949, the Respondent, in the course and conduct of its business operations, caused to be purchased, transferred, and delivered to its place of business in Mount Vernon, New York, newspapers, magazines, and other periodicals valued at in excess of \$500,000, of which approximately 10 percent was transported to its place of business in New York from points outside the State of New York. Among publishers from whom the Respondent purchased newspapers, magazines, and other periodicals were the Curtis Publishing Company, in Philadelphia, Pennsylvania, and the Fawcett Publishing Company, in Greenwich, Connecticut. Among the newspapers purchased by the Respondent were the New York Times, the New York Herald-Tribune, the New York Daily News, and the New York Mirror, all of which utilize the wire services of the United Press and the Associated Press.

The periodicals purchased by the Respondent are delivered by the publishers to the Respondent's plant. They are then bundled and delivered to dealers in trucks driven by the Respondent's employees. Unsold copies are returned to the Respondent's plant. During the year ending January [fol. 26] 1949, the Respondent, in the course and conduct

⁷ The facts contained in this section are derived from the Respondent's answer, stipulations entered into between the General Counsel and the Respondent, and the uncontradicted testimony of James B. Gaynor, president of the Respondent.

of its business operations, sold and delivered newspapers, magazines, and other periodicals valued at in excess of \$1,000,000, of which approximately 25 percent was transported from its place of business in New York to points outside the State of New York.

The Respondent is a member of the Suburban Wholesalers Association, which has members in the States of New York and New Jersey.

The Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.^{7a}

II. The Organization Involved

Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The issue of Section 10 (b)

The original charge, which was served upon the Respondent on February 3, 1949, alleges in effect that, since July 20, 1947, and at all times thereafter, the Respondent violated Section 8 (a) (1) and (3) of the Act by paying Sheldon A. Loner lower wages than it paid to members of the Union and has refused to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and vacation benefits which it paid to members of the Union, because he was not a member of the Union. The amended charge, served on the Respondent on June 13, 1950, alleges in effect that the Respondent since August 1, 1948, and at all times thereafter, violated Section 8 (a) (1), (2), and (3) of the Act by failing and refusing to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and vacation pay which it paid to members of the Union, because he was not a member of the Union, and by executing, on October 25, 1948, an illegal contract requiring membership in the Union. The complaint, as described above, alleges in effect that the Respondent failed and refused to make retroactive wage

^{7a} Stanislaus Implement and Hardware Company, Limited, 91 NLRB No. 116.

payments and grant retroactive vacation benefits not only to Loner, but to all other nonunion employees similarly situated.

The Respondent takes the position that the complaint should be limited to the alleged violation of Section 8 (a) (1) and (3) involved in its failure to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and the failure to pay him retroactive vacation pay which it paid to members of the Union. It would exclude from consideration all allegations that similar treatment was accorded to non-members of the Union other than Loner, and any consideration of the legality or illegality of the contract of October 25, 1948, on the ground that these allegations were added to the original charge more than 6 months after the alleged acts had taken place. This position is predicated upon the proviso to Section 10 (b) of the amended Act, the pertinent part of which reads as follows:

* * * No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom said charge is made. * * *

[fol. 28] In *Cathey Lumber Company*,⁸ a charge had been filed and served prior to the enactment of the proviso to Section 10 (b), quoted above. After the proviso took effect, the complaint was issued. It contained allegations of additional unfair labor practices not set forth in the charge, which had occurred prior to the effective date of the proviso and more than 6 months prior to the issuance of the complaint. The respondent in that case and the General Counsel, pointing to the provisions of Section 10 (b), there contended that the Board could not include in the complaint any allegations of unfair labor practices which were not included in the original charge and which occurred more than 6 months prior to the issuance of the complaint. In rejecting this view, the Board stated:

As there is no requirement that the charge set forth each unfair labor practice allegation to be litigated,

⁸ 86 NLRB 157.

the practice of enlarging upon the charge to include in the complaint allegations of unfair labor practices uncovered during the investigation likewise continues unchanged under the Amended Act—but with this important exception made necessary by the purpose of the limitation period imposed by the proviso: that the complaint shall not include allegations of any unfair labor practices occurring more than 6 months prior to the filing and service of the charge initiating the case. it follows that we must reject the construction of the proviso to Section 10 (b) advocated by the Respondent and the General Counsel to the extent that it would also proscribe inclusion in the complaint of allegations of unfair labor practices not specifically mentioned in a charge, although the charge was filed with the Board [fol. 29] and served upon the party charged within 6 months after the commission of the particular alleged unfair labor practices.

Upon the basis of the foregoing, we conclude that *the proviso to Section 10 (b) merely extinguished liability for those unfair labor practices which were committed more than 6 months prior to the filing and service of the charge initiating the case, and that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing of such charge.* (Emphasis added.)

The Respondent relies upon *Joanna Cotton Mills Company v. N.L.R.B.*⁹ and *Superior Engraving Company v. N.L.R.B.*¹⁰ as authorities repudiating the *Cathey* doctrine. With great respect for the courts which decided those cases, I am constrained to adopt the principle enunciated by the Board in the *Cathey* case until the Supreme Court of the United States has had an opportunity to pass upon the question.¹¹

⁹ 176 F. 2d 749 (C. A. 4).

¹⁰ F. 2d (C. A. 7), decided June 27, 1950, 26 LRRM 2351.

¹¹ Compare *Bethlehem Steel Company, Shipbuilding Division, et al.*, 89 NLRB No. 33; and *J. H. Rutter-Rex Manufacturing Company, Inc.*, 90 NLRB No. 15.

The doctrine set forth in the *Cathey* case, which has been consistently followed by the Board,¹² is dispositive of the Respondent's contentions herein. I therefore find that the charges herein were timely filed and served with respect to [fol. 30] any unfair labor practices which occurred within the 6 months prior to February 3, 1949, whether or not said unfair labor practices were specifically mentioned in the original charge. Accordingly, the Respondent's motion to strike certain allegations of the complaint has been denied.

B. Chronology of events

The essential facts are not disputed. The Respondent and the Union have had collective bargaining agreements with respect to the employees of the Respondent's delivery department since 1943. On January 2, 1946, they executed a contract in which it was stated that the Union was contracting "for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the employer."¹³ This agreement was made effective from October 1, 1945, to October 16, 1947.

¹² See, for example, *J. H. Rutter-Rex Manufacturing Company, Inc.*, 86 NLRB 470. The Intermediate Report in *Childs Company*, Cases Nos. 2-CA-420 and 2-CB-130, cited by the Respondent, contains nothing inconsistent with the *Cathey* principle. Moreover, this Intermediate Report is presently pending before the Board for decision.

¹³ The contract described the categories covered as "chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay men, and Canada men." The General Counsel and the Respondent stated at the hearing that all the categories listed in the contract were employed in the Respondent's delivery department. For convenience, these employees will be collectively referred to herein as the delivery department employees.

James B. Gaynor, president of the Respondent, testified without contradiction that chauffeurs and route men are the same as drivers, that he did not know what distributors are, that tiers, wrapper writers, and loaders are the same as floormen, and that the Respondent employs no Canada men nor relay men.

It contained a closed-shop clause, provided for specified wages, and for paid vacations based on the number of days worked during the previous year.

Despite the closed-shop provisions of this contract, the Respondent employed in its delivery department employees known to be nonunion.

On August 22, 1946, the parties executed an agreement extending the term of the previous contract to October 18, [fol. 31] 1948. This extension agreement increased wages and contained other amendments, not here material.

On August 16, 1948, while the above-described contract, as extended, was in force, the Union filed with the Board's Regional Director for the Second Region a petition covering the Respondent's delivery department employees,¹⁴ seeking authority to bargain with respect to union security.¹⁵ At the Union's request, the Regional Director approved the withdrawal of this petition on September 13, 1948.¹⁶

Thereafter, on October 25, 1948, the Respondent and the Union entered into a new collective bargaining contract in which the Respondent recognized the Union as the exclusive bargaining representative of the Respondent's employees in its delivery department.¹⁷ This contract is still in effect.¹⁸ It increased wages beyond the previous rates,

¹⁴ The unit described in the petition included all the Respondent's drivers, route men, and loader, but excluded foremen, clerical employees, guards, and professional employees. Hence, it was substantially the same as the unit covered in the contract. See footnote 13, *supra*.

¹⁵ *Gaynor News Co.*, Case No. 2-UA-4273.

¹⁶ At the request of the General Counsel, I have taken judicial notice of the Board's records in Case No. 2-UA-4273. *J. S. Abercrombie Company*, 83 NLRB 524, petition for review denied, 180 F. 2d 578 (C. A. 5).

¹⁷ The unit described in the contract of October 25, 1948, is identical with that contained in the 1946 contract.

¹⁸ The contract provided that it should remain in force for 90 days after "the expiration date of the contract between the Union and the Publishers Association of New York." The parties stipulated that the Publishers Association's contract is due to expire on October 25, 1950.

and provided for more liberal vacation benefits. It further contained certain clauses which the General Counsel maintains violate the Act. These clauses will be discussed below.

In November 1948, the Respondent made a retroactive wage payment to each union member employed in the [fol. 32] categories here involved, covering the period from July 17 to October 25, 1948.¹⁹ No similar payments were made to nonunion employees in these categories.

Sheldon A. Loner, a witness for the Respondent, testified, in effect, that he had been employed in the Respondent's delivery department from June 1947 to December 3, 1948. In November 1948, Loner learned from other employees who were members of the Union that retroactive wage payments were being made to union members. He then asked Murray Levine, the Respondent's night foreman, "Do I get retroactive pay?" Levine replied that Loner was not entitled to retroactive pay because he was not a member of the Union. Despite the fact that Loner had worked during the period between July 17 and October 25, 1948, he received no retroactive wage payment.

As noted above, the 1946 contract provided for vacations with pay, based upon the number of days worked in the preceding calendar year. In 1948, paid vacations were granted to employees of the delivery department who were members of the Union, based on the number of days worked in 1947, and calculated according to a schedule contained in the 1946 contract. As has also been seen, the 1948 contract provided for more liberal vacation benefits. Starting in January 1949, the Respondent made payments to employees in its delivery department who were members of the Union, based on the number of days worked in 1947, to compensate retroactively for the difference between the vacation schedules of the 1946

¹⁹ This was computed as follows: The difference between the old daily rate and the new daily rate was multiplied by the number of days worked by the employee in question between July 17 and October 25, 1948. A similar retroactive increase was computed for overtime work on the basis of time and a half.

and 1948 contracts. No similar payments were made to delivery department employees who were not members of the Union. Loner received no vacation in 1948, and was not given any payment in lieu of vacation, although he had worked a sufficient number of days in 1947 to have qualified had he been a union member.²⁰

In 1949, the Respondent granted vacations equally to its union and nonunion employees.

C. Legality of the Retroactive Wage and Vacation Payments

In essence, the facts show that the Respondent, as charged in the complaint, made retroactive wage payments and retroactive payments in lieu of vacation to its delivery department employees who were members of the Union, but failed and refused to make similar payments to nonunion delivery department employees who were otherwise eligible. The sole factor in determining whether or not a particular employee received these payments was his membership or nonmembership in the Union. Leon Asche, manager of the Respondent's bookkeeping department, testified as follows:

Trial Examiner Asher: Mr. Asche, you have testified that certain payments were made to union men only. How did you know which men were union and which men were not in order to determine whether to make payments to them or not?

[fol. 34] Witness: I was told through Mr. Gaynor.

Trial Examiner Asher: Did Mr. Gaynor supply you with a list?

The Witness: With a record, not with a list. We were supplied with employees' record cards which are marked union if they are union.

Trial Examiner Asher: Do you have such a record card for each employee on the payroll?

The Witness: That's right.

Trial Examiner Asher: And opposite each employee's

²⁰ The facts contained in this paragraph are based primarily on the admissions in the Respondent's and the Union's answers, and the testimony of Leon Asche, manager of the Respondent's bookkeeping department.

name on these cards is shown whether or not he is a union member?

The Witness: That is the only way I know of, who are members and who are not.

Trial Examiner Asher: You have seen those cards?

The Witness: Yes.

Trial Examiner Asher: And you used those cards as a guide?

The Witness: Right.

Under strikingly similar facts, the Board has held that the granting of retroactive wage payments to employees who were union members, while failing and refusing to grant such payments to employees who were not union members, constitutes a violation of Section 8 (a) (1) and (3) of the Act.²¹

[fol. 35] The Respondent contends that the retroactive wage payments and vacation benefits were paid under the compulsion of a legally binding contract, and therefore cannot be held violative of the Act. It argues: "The employer in this case has been guilty only of the time-honored business practice of not spending money which he is not obliged to spend." In support of this contention, James B. Gaynor, the Respondent's president, testified without contradiction that he ordered retroactive wage payments and vacation benefits withheld from nonunion employees because he believed that the 1946 contract and its supplement required such payments to be made to union members only. The short answer to this argument is that neither the 1946 contract nor its supplement of August 22, 1946, required these retroactive payments to be made to *any* employees.²²

²¹ *Reliable Newspaper Delivery, Inc.*, 88 NLRB No. 135.

²² The Respondent's brief states: "In October, 1947, a rider was attached to the 1946 contract to the effect that the wage rate of the new contract to be drawn in October, 1948, would be retroactive to a certain date in 1948, that date being the date the Union and the Publishers' Association signed their contract. In conformance with the terms of the January 2, 1946 contract, * * * this rider applied only to Union members like all other provisions of that 1946 contract." The record, however, does not show the execution of any October 1947 rider.

Indeed, the Respondent's counsel, referring to the retroactive vacation benefits, frankly admitted that these payments were granted voluntarily, and not as the result of any contractual obligation. The statement of the Respondent's counsel on this point was as follows:

"Because of the fact that it had been established as general practice in other branches of the industry, and *despite the fact that under the contract we were not obligated to give our employees a third week of retroactive vacation*, in the interests of good labor relations and to maintain peace with the Union, and not [fol. 36] to have a different standard apply throughout the industry, *we voluntarily granted those of our employees who were with us a third week's vacation.*" (Emphasis supplied.)

It is therefore abundantly clear that the Respondent was not "acting in good faith in accordance with the terms of its agreement," as alleged in the Respondent's brief, at least insofar as the vacation benefits were concerned. But even assuming, for the purpose of argument, that the 1946 contract required these retroactive payments to union members, and assuming the validity of that contract,²³ the Respondent can derive no comfort therefrom, as it is clear that nothing in the contract prohibited equal payments to nonunion employees.²⁴ Thus, even-handed treatment of the nonunion employees would not have amounted to a contract violation. And the gist of the discrimination

²³ The Respondent takes the position that the 1946 contract, executed before the enactment of the Labor Management Relations Act of 1947, is valid. The General Counsel, arguing orally before the Trial Examiner at the hearing, pointed out that the January 1946 agreement and its supplement were "members only" contracts, and maintained that they therefore provided for an inappropriate unit. In view of my disposition of the Respondent's defense based on the 1946 contract, I do not express any opinion as to the contract's validity.

²⁴ *Reliable Newspaper Delivery, Inc., supra*, (footnote 1 therein).

with which the Respondent is charged is not for the granting of retroactive payments to the union employees, but rather the disparate treatment accorded the nonunion men.

The Respondent further contends that the closed-shop provisions of the 1946 contract were valid under the proviso to Section 8 (3) of the Wagner Act,²⁵ that the nonunion [fol. 37] employees could therefore have been legally discharged during the life of that contract, and that their wages could accordingly have differed from those of the union employees. This contention lacks merit. The proviso to Section 8 (3) of the Wagner Act, like its counterpart in Section 8 (a) (3) of the amended Act, permitted the conditioning of *employment*, under certain circumstances, upon membership in a particular labor organization; it did *not* permit *disparate wage treatment* of employees on the basis of union affiliation.²⁶ The Respondent's argument that "There is no difference between discrimination by means of an illegal discharge and discrimination by means of disparate payments of wage and vacation benefits" is therefore rejected.

The Respondent further maintains that no law requires it to pay equal pay for equal work. This overlooks Section 8 (a) (1) of the Act, which prohibits interference with the employees' selection of bargaining agent. Section 8 (a) (2), which prohibits illegal assistance to a labor organization, and Section 8 (a) (3), which prohibits discrimination to encourage or discourage membership in a labor organization. If the unequal pay interfered with the employees' freedom of choice of bargaining representative, lent illegal support to the Union, or encouraged membership in the Union, it was proscribed by the Act.

The Respondent offered to prove that Loner, the charging party herein, made the Board his tool in his attempt to obtain membership in the Union. In addition, the Re-

²⁵ This proviso read: "Nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein."

²⁶ *Reliable Newspaper Delivery, Inc.*, *supra*, (footnote 1 therein).

spondent points to the fact that the Union was not joined as a party respondent. But the motives of the charging [fol. 38] party, "however evil or unlawful," are immaterial.²⁷ Nor may I properly concern myself with speculations as to why the Union was not joined as a respondent. The sole question before me is the truth of the accusations of unfair labor practices contained in the complaint.

As tending to establish that the granting of retroactive wage increases and vacation benefits to union employees alone did not encourage membership in the Union, the Respondent offered to show that the nonunion employees were "trying every devise known" to become members of the Union. It contended that, as their selection of bargaining agent had already been made, "encouragement of and interference therewith was no longer possible." In support of this contention, the Respondent sought to produce evidence that Loner had obtained his job with the Respondent through union intercession, and that before the retroactive payments were made, he had applied for membership in the Union and that his application was still pending. This proffered testimony was excluded, in accordance with the well-settled principle that the actual effect of the Respondent's conduct upon its employees' state of mind is immaterial.²⁸ Accordingly, testimony inquiring into Loner's state of mind, or that of any other employee, is incompetent.

The Respondent also contends that the General Counsel is required to produce proof of both the purpose and effect of the Respondent's conduct, and that he has failed to adduce any proof of illegal purpose. An identical contention was considered and rejected in the *Reliable* case,²⁹ For reasons set forth in that case, I find no merit in

Finally, the Respondent vigorously contends that the record is barren of any evidence that the discriminatory

²⁷ *N.L.R.B. v. Fulton Bag & Cotton Mills*, 180 F. 2d 68 (C.A. 10).

²⁸ *The Red Rock Company, et al.*, 84 NLRB 521, 525; and *Forest Oil Corporation*, 85, NLRB 85, 86.

²⁹ *Reliable Newspaper Delivery, Inc.*, *supra* (footnote 9 of the Intermediate Report).
this contention.

treatment of nonunion employees encouraged them to join the Union. However, it was incumbent upon the General Counsel to prove that an- nonunion employees were, in fact, encouraged. The test of the Respondent's violation of the Act turns on whether or not it has engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.³⁰ It is obvious that the discrimination with respect to retroactive wages and vacation benefits had the natural and probable effect not only of encouraging nonunion employees to join the Union, but also of encouraging union employees to retain their union membership.³¹ I so find.

I find that, by granting retroactive wage payments in or about November 1948, and by paying retroactive vacation benefits beginning in or about January 1949, to certain of its employees who were members of the Union, while failing and refusing to make such payments to its nonunion employees who were similarly situated, because they were [fol. 40] not members of the Union, the Respondent has discriminated in regard to the terms and conditions of employment of the said nonunion employees, thereby encouraging membership in the Union, in violation of Section 8 (a) (3) of the Act, and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act. I further find that, by the said conduct, the Respondent has contributed illegal assistance and support to the Union, in violation of Section 8 (a) (2) of the Act. Accordingly, the Respondent's various motions to dismiss the complaint are hereby denied.

³⁰ *N.L.R.B. v. Illinois Tool Works Company*, 153 F. 2d 811, 814 (C. A. 7); and *N.L.R.B. v. Ford Brothers*, 170 F. 2d 735 (C.A. 6).

³¹ The General Counsel also urges that the disparate treatment discouraged membership in any potential or existing rival labor organization. However, the complaint alleges only the *encouragement* of membership in the Union, and is silent as to discouragement. Accordingly, I deem it unnecessary to decide whether or not the Respondent's acts constituted discouragement of membership in any other labor organization.

D. Legality of the contract of October 25, 1948

The General Counsel maintains that two clauses in the contract of October 25, 1948, between the Respondent and the Union, are illegal. One of the clauses under attack by the General Counsel reads as follows:

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

This contract, having been executed after the effective date of the Labor Management Relations Act of 1947, is subject to the restrictions imposed by amendments contained therein. In order to determine the legality or illegality of the above-quoted clause, it is therefore necessary to examine the statutory requirements of the Act, as amended, [fol.41] with respect to contracts providing for union security. Section 9 (e) of the Act, as amended, provides for Board-conducted elections and certifications of authority to bargain with respect to union security. Section 8 (a) (3) of the Act, as amended, in effect prohibits discrimination with respect to the hire or tenure of employment to encourage or discourage membership in any labor organization, and contains the following proviso:

* * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * if, following the most recent election held as provided in section 9 (e) *the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement* * * * (Emphasis supplied.)

Thus, an election under Section 9 (e) and a resulting Board certificate are ordinary *prerequisites* to the execution of a valid union-security provision. Pointing out that the record does not show that the Union had received any such certificate from the Board prior to the execution of the contract, the General Counsel maintains that section 2-b of the contract does not fall within the proviso to Section 8 (a) (3) of the Act, as amended. Unquestionably, as the General Counsel contends, the record fails to show that the Board certified the Union's authority to bargain with respect to union security, prior to the execution of the [fol. 42] contract.³² Section 2-b of the contract therefore clearly violated the statutory requirements. The mere existence of such a provision acts as a restraint upon those desiring to refrain from union activities within the meaning of Section 7 of the Act.³³ Moreover, by assenting to an unlawful union-security clause, the Respondent lent its support to the Union in recruiting and maintaining its membership. By entering into such a contract, and by

³² It will be recalled that the Union's answer alleged that the Union had filed a petition for authority to bargain with respect to union security and that the Regional Director had arbitrarily refused to process this petition. The record fails to substantiate this allegation. Indeed, the only such petition filed *before* the execution of the contract was withdrawn at the Union's request. *After* the execution of the contract on January 11, 1949, the Union filed another petition with respect to union security (Case No. 2-UA-4890). This petition, which covered employees of members of the Suburban Wholesalers Association, Inc., including the Respondent, is still pending. On December 19, 1949, the Union filed a third similar petition with respect to the Respondent's delivery department employees (Case No. 2-UA-5448). At the Respondent's request, this petition was withdrawn on January 4, 1950. Thus, no election for union security has been held, and no Board certificate issued.

³³ *C. Hager & Sons Hinge Manufacturing Company*, 80 NLRB 163.

keeping it in full force and effect, the Respondent has therefore violated Section 8 (a) (1) and (2) of the Act.³⁴

The Respondent and the Union maintain, however, that section 17 of the contract defers the application of the union-shop provision until after the Union has been authorized by the Board to bargain with respect to union security, and therefore saves the contract from illegality. [fol. 43] I do not agree. Section 17 of the contract, relied upon by the Union and the Respondent, reads in pertinent part as follows:

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is true that the Board has held that a contract which contains a clause that its union-security provisions should not become effective until after it has been authorized by an election is clearly lawful.³⁵ On the other hand, where the effect of a saving clause, attached to an unauthorized union-security provision, is not to defer the application

³⁴ *Julius Resnick, Inc.*, 86 NLRB 38; and *Salant & Salant, Incorporated*, 87 NLRB No. 36.

The Respondent's attorney described the relationship between the Respondent and the Union as follows: "We fight like cats and dogs. We negotiate at arm's length. We are hostile to one another." Assuming, without deciding, that the record indicated that hostility existed between the Respondent and the Union, such fact is not inconsistent with a finding that the Respondent, by entering into a contract containing illegal union-security provisions, contributed unlawful support and assistance to the Union.

³⁵ *Schaefer Body, Inc.*, 85 NLRB 195; and *Wyckoff Steel Company*, 86 NLRB 1318.

of that provision, but merely to postpone the issue of its legality for future determination by some proper tribunal, the contract in which the clause appears is illegal.³⁶ Section 17 of the instant contract falls within the latter rule. In the absence of a specific clause expressly deferring application of the union-shop provision, I believe that this clause can only be construed to mean that unless and until a tribunal authorized to interpret and administer the law [fol. 44] determines that a particular discharge for non-membership in the Union is unlawful, the union-security provisions of the contract are fully effective.³⁷ Accordingly, section 17 of the contract does not save the union-security clause from illegality.³⁸

³⁶ *Lykens Hosiery Mills, Inc.*, 82 NLRB 981; *Unique Art Manufacturing Co.*, 83 NLRB 1250; and *Aluminum Ore Company*, 85 NLRB 121 (footnote 7 therein).

³⁷ *Reading Hardware Corporation*, 85 NLRB 610; and *Evans Milling Company*, 85 NLRB 391. The Respondent's brief states: "The parties further agreed that in conformance with the provisions of the Taft-Hartley Act, a union shop election would be held as soon as was practicable." The record does not support this statement. However, even if such an arrangement had been made, it would not aid the Respondent. In order to eradicate the restraint imposed upon the employees by the unauthorized union-shop provision, the deferring of its effectiveness until a Board certification has been secured must be in writing, signed by both contracting parties, and called to the attention of the employees. *Evans Milling Company*, *supra*; *Flint Lumber Company*, 85 NLRB 943; *Roosevelt Oil and Refining Corporation*, 85 NLRB 965; and *Empire Zinc Division, The New Jersey Zinc Company*, 86 NLRB 685.

³⁸ The Respondent intimates that it was compelled to enter into this contract by virtue of the Union's superior economic power. However, it has long been established law that economic necessity is no defense for the commission of unfair labor practices. *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470, (C. A. 9); *N. L. R. B. v. Gluek Brewing Company, et al.*, 144 F. 2d 847, 853, (C. A. 8), and cases cited therein; and *H. M. Newman*, 85 NLRB 725 (footnote 13 of the Intermediate Report).

The second clause under attack by the General Counsel concerns the powers of an adjustment board established by the parties for the settlement of grievances. This clause, section 18-k, reads as follows:

18-k. A majority of the Adjustment Board shall have the power to make all appropriate findings, decisions and awards in any and all matters submitted to it pursuant to the provisions thereof, and in any such matter to take or to direct the taking of any action which it may deem necessary or proper to make effective the provisions and intent hereof to safeguard the rights of the several parties hereto *which shall include the power to order reinstatement of any member of the Union found to have been improperly discharged or discriminated against with or without back pay* * * *. (Emphasis supplied.)

The General Counsel contends that the above-quoted section of the contract grants a preference to members of the Union. I cannot agree. As I read section 18-k, it cloaks the adjustment board with authority "to take or direct the taking of any action which it may deem necessary or proper to make effective the provisions and intent thereof * * * which shall *include* the power to order reinstatement of any member of the Union found to have been improperly discharged or discriminated against." Thus, the first part of the section confers broad powers upon the adjustment board. The latter part, which refers specifically to union members, is only inclusive. Hence there is nothing in section 18-k which requires unequal treatment of nonunion members. Accordingly, I find no merit in the contention of the General Counsel that section 18-k of the contract contains an illegal preference in favor of union members.

I find that, by entering into an agreement with the Union on October 25, 1948, which contained illegal union-security provisions in section 2-b thereof, and by continuing the said contract in full force and effect, the Respondent has imposed a restraint upon those of its employees who desired to refrain from union activities within the meaning of Section 7 of the Act, as amended, and has thereby violated Section 8 (a) (1) of the Act. I further find that, by the said acts, the Respondent has lent its support to the

Union in recruiting and maintaining its membership and has coerced its employees to become and remain members [fol. 46] of the Union, thereby violating Section 8 (a) (2) of the Act.³⁹ Accordingly, I hereby deny the motion of the Union and the motions of the Respondent that the complaint be dismissed.⁴⁰

E. Alleged additional interference, restraint, and coercion

It will be recalled that in November 1948, Murray Levine, the Respondent's night foreman, told Loner that Loner did not receive retroactive pay because he was not a member of the Union. The General Counsel suggested that this conduct on the part of one of the Respondent's supervisors might possibly have constituted an independent instance of interference, restraint, and coercion of the rights of employees guaranteed by Section 7 of the Act. However, the complaint does not mention this statement by Levine nor does it allege any separate instances of coercion other than those discussed above. Accordingly, I find it unnecessary to decide whether or not Levine's statement constituted an additional violation of Section 8(a) (1) of the Act.

³⁹ While the complaint also alleged the execution and continuation of the contract as a violation of Section 8 (a) (3) of the Act, I find it unnecessary to pass upon this issue. Whether predicated upon a violation of Section 8 (a) (1), or of Section 8 (a) (3), or both, the remedy hereinafter recommended is necessary in order to effectuate the policies of the Act. See footnote 2 in *Smith Victory Corporation*, 90 NLRB No. 283; *Columbia Pictures Corporation, et al.*, 82 NLRB 568, 576.

⁴⁰ The Respondent also moved to dismiss the complaint with respect to the contract on the ground that there was a fatal variance between the allegation of the complaint and the proof. This motion was apparently based on the theory that section 17 of the contract showed on its face, that the contract was not illegal. In view of my findings, above, this motion is without merit and is hereby denied.

[fol. 47] IV. The Effect of the Unfair Labor Practices
Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the purposes and policies of the Act.

It has been found that the Respondent violated Section 8 (a) (1), (2), and (3) of the Act by paying retroactive wages and vacation benefits to employees of its delivery department who were members of the Union, while failing and refusing to make similar retroactive payments to employees of its delivery department who were not members of the Union. It will therefore be recommended that the Respondent cease and desist from encouraging membership in the Union or any other labor organization of its employees by discriminating with respect to any term or condition of their employment. It will further be recommended that the Respondent make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated,⁴¹ for any loss of pay they may have suffered by reason of the Respondent's failure and refusal to pay them retroactive wages for the period from about July 17 to about October 25, 1948, in the same manner as paid by the Respondent to its union employees, and also for any loss of pay they may have suffered by reason of the Respondent's failure and refusal to pay them retroactive vacation benefits for the calendar year 1947, in the same manner as paid by the Respondent to its union employees.

It has further been found that the Respondent violated

⁴¹ *Reliable Newspaper Delivery, Inc.*, *supra*; and *Somerset Classics, Inc.*, *et al.*, 90 NLRB No. 216.

Section 8 (a) (1) and (2) of the Act by executing and continuing in full force and effect the illegal union-security clause in its contract with the Union of October 25, 1948. The effect of such violation was to coerce its employees into becoming and remaining members of the Union, a vice which Section 8 (a) (3) and Section 9 (e) were intended to avoid. Accordingly I shall recommend that the Respondent cease and desist from giving effect to the illegal union-security clause.⁴² I am also persuaded that the effect of the coercive conduct would not be eradicated were the Union to be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract and the discriminatory payments mentioned above. Therefore, in order to effectuate the purposes and policies of the Act, I shall recommend that the Respondent withdraw recognition from the Union and cease giving effect to its contract of October 25, 1948, with that organization, or to [fol. 49] any modification, extension, supplement, or renewal thereof, unless and until the Union has been certified by the Board. Nothing contained herein shall, however, be deemed to require the Respondent to vary or abandon those wage, hour, seniority, or other substantive features of its relations with its employees, established in the performance of the said contract, or to prejudice the assertion by the employees of any rights they may have under the said agreement.

In order to insure expeditious compliance with the recommended back-pay order, I shall recommend that the Respondent, upon reasonable request, make any pertinent records available to the Board and its agents.⁴³

⁴² The Respondent argues that "an order requiring Respondent to cease and desist from giving effect to Section 2-b of the contract would create industrial disorder on a scale previously unknown in the industry." In the last analysis, the Respondent's contention is that it will be subjected to great hardship. Such an argument should be addressed to the Congress rather than to the Board or the Trial Examiner. *Compure N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9).

⁴³ *F. W. Woolworth Company*, 90 NLRB No. 41.

In my opinion, the execution and continuation in full force and effect of the illegal union-security clause contained in the contract of October 25, 1948, was a flagrant attempt by the Respondent to avoid its statutory obligations. Such contract clauses clearly constitute violations of the letter and the spirit of the Act, as amended. I therefore find that the unfair labor practices found are persuasively related to other unfair labor practices proscribed, and that danger of their commission in the future is to be anticipated from the course of the Respondent's conduct in the past.⁴⁴ The preventative purposes of the Act will be thwarted unless the order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize industrial strife which burdens and obstructs commerce, and thus effectuates [fol. 50] the policies of the Act, I will recommend that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the terms and conditions of employment of Sheldon A. Loner, and of other nonunion employees similarly situated, thereby encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By the said acts, thereby contributing illegal assistance and support to Newspaper and Mail Deliverers' Union of New York and Vicinity, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (2) of the Act.

4. By executing and continuing in full force and effect

⁴⁴ *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426.

its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, thereby contributing assistance and support to the said labor organization through the illegal provisions of the said contract, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

[fol. 51] 5. By the said acts, the Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees;

(b) Entering into, renewing, or giving effect to any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment or of continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(c) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the [fol. 52] representative of any of its employees, for the purpose of dealing with the Respondent concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said labor organization shall have been certified by the National Labor Relations Board;

(d) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner, and all other non-union employees who were similarly situated, for any loss [fol. 53] of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the section entitled "The remedy," herein;

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organizations

shall have been certified by the National Labor Relations Board;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this recommended order;

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the said Regional Director, in writing, within twenty (20) days from the date of this Intermediate Report, [fol. 54] what steps the Respondent has taken to comply with the foregoing recommendations.

It is further recommended that, unless the Respondent shall, within twenty (20) days from the date of the receipt of this Intermediate Report, notify said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a

brief in support of the Intermediate Report.⁴⁵ Immediately upon the filing of such statement of exceptions and/or briefs, the parties filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double [fol. 55] spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed, as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 19th day of October, 1950.

Sydney S. Asher, Jr., Trial Examiner.

IR-298

APPENDIX A

Notice to All Employees Pursuant to The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

[fol. 56] We will not encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discrimi-

⁴⁵ Exceptions and briefs must be received by the Board in Washington, D. C., *within* the specified period allowed. *Western Wear of California, Inc.*, 87 NLRB No. 159.

nating in regard to their hire and tenure of employment, or any term or condition of employment.

We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as a representative of any of our employees for the purposes of dealing with us concerning [fol. 57] grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the National Labor Relations Board.

We will cease performing or giving effect to our contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board.

We will make whole Sheldon A. Loner, and all other non-union employees who were similarly situated, for any loss of pay they may have suffered as a result of our discrimi-

nation against them, in accordance with the recommendations of the Intermediate Report.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc., Employer.

Dated——by—— Representative——Title

This notice must remain posted for 60 day from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 58] BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

Transcript of Hearing of July 17, 1950

2 Park Avenue, New York, N. Y.

Met, pursuant to notice, at 2:00 o'clock P. M.

Before: Sidney S. Asher, Jr., Trial Examiner.

APPEARANCES:

Merton C. Bernstein, Esq. and Jerome Reiner, Esq., Counsel for the General Counsel.

Messrs. Bandler, Haas & Kass, By: Julius Kass, Esq., of Counsel and Richard L. Halpern, Esq., 11 Broadway, New York, New York, appearing for Gaynor News Company, Inc.

[fol. 59] Samuel Duker, Esq., 11 West 42nd Street, New York, N. Y. appearing for Newspaper & Mail Deliverers' Union of New York and Vicinity.

* * * * *

PROCEEDINGS

Trial Examiner Asher: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Gaynor News Company, Inc.

and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract, Case No. 2-CA-605.

The Trial Examiner conducting this hearing is Sidney S. Asher, Jr.

Will counsel for the General Counsel and the various parties kindly state their appearances for the record?

For the General Counsel?

Mr. Bernstein: Merton C. Bernstein and Jerome A. Reiner, counsel for the General Counsel, 2 Park Avenue, New York City.

Trial Examiner Asher: For the respondent?

Mr. Kass: For the respondent, Gaynor News Company, Bandler, Haas and Kass, by Julius Kass and Richard L. Halpern, 11 Broadway, New York 4.

Trial Examiner Asher: For the charging party, any appearance?

Mr. Bernstein: No separate counsel for the charging party.

Trial Examiner Asher: For the intervener?

Mr. Duker: I presume that is us, sir?

Trial Examiner Asher: Right.

[fol. 60] Mr. Duker: Samuel Duker, 11 West 42nd Street, New York 18, New York.

* * * * * * *

Mr. Bernstein: Will you mark this as General Counsel's Exhibit No. 1 through 1-N?

(Documents referred to were marked for identification as General Counsel's Exhibit No. 1 through 1-n, respectively.)

OFFERS IN EVIDENCE

Mr. Bernstein: Counsel for the General Counsel requests the reporter to mark as General Counsel's Exhibit No. 1-A the original of the charge herein filed, February 1, 1949; as 1-B a return receipt dated February 3, 1949 indicating service of the charge upon Gaynor News Company, Inc.; an affidavit of service dated February 1, 1949 indicating service of the aforementioned charge upon Gaynor News Company, Inc. as 1-C; as 1-D, the original of an amended charge filed

on June 8, 1950; as 1-E, the return receipt dated June 13, 1950 indicating service of the aforementioned amended charge upon Gaynor News Company, Inc.; as 1-F, an affidavit of service of the amended charge dated June 9, 1950; as 1-G, the original of the notice of hearing dated June 13, 1950 as setting July 17, 1950 at 1:00 P. M. as the date and time of hearing; the original of the complaint herein as 1-H; as 1-I, the original return receipt dated June 16, indicating service of the notice of hearing and complaint upon Gaynor News Company; as 1-J, the return receipt dated June 14, 1950, indicating service of a notice of hearing and complaint herein upon Sheldon Loner, the charging party; as 1-K, a return receipt dated June 14, 1950, indicating service of the notice of hearing and the complaint upon Newspaper and [fol. 61] Mail Deliverers' Union of New York and Vicinity; as 1-L, an affidavit of service dated June 13, 1950 indicating service of a notice of hearing, complaint, charge and amended charge upon Gaynor News Company, Inc., Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity; as 1-M, the answer of respondent, Gaynor News Company, Inc.; and as 1-N, the answer of Newspaper and Mail Deliverers' Union of New York and Vicinity.

Trial Examiner Asher: Are you offering those into evidence?

Mr. Bernstein: Yes, I am, Mr. Examiner.

Trial Examiner Asher: Are there any objections, Mr. Kass?

Mr. Kass: My only objection is to the offer of Exhibit No. 1-N which apparently is an answer filed by the union, a copy of which we have neither received nor seen.

Trial Examiner Asher: Of course you have the right to examine it now since it has been offered into evidence. You have no objection to any of the other exhibits, General Counsel's Exhibits No. 1-A through 1-M, inclusive?

Mr. Kass: None whatsoever.

Mr. Duker: No objection.

Trial Examiner Asher: Hearing no objection, General Counsel's Exhibits 1-A through 1-M are admitted in evidence. As to 1-N, Mr. Duker, do you have any objection?

Mr. Duker: No objection.

Trial Examiner Asher: We will take a three-minute recess. I will reserve ruling on 1-N.

(Short recess.)

Trial Examiner Asher: The hearing will be in order.

Mr. Bernstein: Mr. Examiner, before your ruling on the acceptance or rejection of General Counsel's Exhibit 1-N, I [fol. 62] would like to note for the record that an inadequate number of the union's answers was filed with the Board. However, I didn't see fit to make a motion to strike the entire answer. I merely wish to note that for the record. I thought that deficiency would be made good.

Trial Examiner Asher: Will you be able to take care of that, Mr. Duker?

Mr. Duker: I will put them in the mail today when I get back to the office.

Trial Examiner Asher: I would like to point out to Mr. Duker that under Section 203.29 of the Board Rules and Regulations I am empowered to rule upon a motion to intervene, but no such motion is before me.

Mr. Duker: At this time I wish to make a formal motion to intervene. I understand it has to be in writing.

Trial Examiner Asher: It does not have to be in writing. It may be oral on the record at the hearing. However, do you desire it to be in writing?

Mr. Duker: I may as well, I have it here.

Mr. Kass: I assume that Mr. Duker will furnish us with a copy of that pleading rather than an exhibit.

Mr. Duker: I will make an oral motion, sir. At this time, I wish to move on the record that Newspaper and Mail Deliverers' Union of New York and Vicinity be permitted to intervene herein and appear as a party in this case.

Trial Examiner Asher: Well, I am going to rule on that motion before I rule on the admissibility of General Counsel's Exhibit 1-N. Under Section 203.29 of the Board Rules and Regulations, I can permit that intervention to such extent and upon such terms as I may deem proper. I am going to grant the motion to intervene in so far as the union will have the right to intervene with respect to the legality [fol. 63] of the contract or the alleged contract between it and the respondent, but for that limited purpose only.

• • • • •

Trial Examiner Asher: I wish to read Section 203.38 of Board's Rules and Regulations:

"Any party shall have the right to appear at such hearing in person, by counsel or by other representative, to call, examine and cross-examine witnesses and to introduce into the record documentary or other evidence except that the participation of any party shall be limited to the extent permitted by the Trial Examiner."

I believe my ruling has covered that. I will therefore rule that General Counsel's Exhibit 1-N is admitted in evidence.

Mr. Kass: May I have an exception?

Trial Examiner Asher: Yes, you have an automatic exception to all adverse rulings.

(Whereupon, documents previously marked for identification as General Counsel's Exhibits 1-A through 1-N, were received in evidence.)

.

Mr. Bernstein: Mr. Examiner, I would like at this time to renew the General Counsel's motion to amend the complaint, Paragraph 10 of the complaint as stated on the record, and I have now provided the other parties with a copy of the proposed new language as stated upon the record.

Trial Examiner Asher: Suppose for the purposes of clarity you offer it in evidence as General Counsel's Exhibit 1-O?

[fol. 64] Mr. Bernstein: Certainly. However, it doesn't contain language to the effect that it is a motion, and merely contains the language which I wish to have substituted.

(Document referred to was marked for identification as General Counsel's Exhibit No. 1-O.)

Trial Examiner Asher: All parties have copies. This has been marked for identification as General Counsel's Exhibit 1-O.

Mr. Kass, I understand that you object to this amendment on the ground that it violates Section 10-B of the Act; am I correct, sir?

Mr. Kass: That's right, sir.

Trial Examiner Asher: Do you wish to be heard on that, Mr. Bernstein?

Mr. Bernstein: Yes, I do, quite briefly. For the most part, the amended section is the same as the paragraph which it supersedes. It adds only from the last comma, 10-A, "and which otherwise provided for the preferential treatment of union members." That is the only new part of the Section 10-A. It is a fairly minor matter which will be contained within the four corners of that agreement.

As to Section 10-B, it merely recites than an agreement has remained in force since October 25, 1948.

Trial Examiner Asher: I believe there is also a motion of Mr. Kass' which would embrace Paragraph 11. My recollection is that your motion, Mr. Kass, embraces Paragraphs 10 and 11.

Mr. Kass: That's right, sir.

Trial Examiner Asher: Do you wish to say anything, Mr. Duker, before I rule?

Mr. Duker: No, sir.

[fol. 65] Trial Examiner Asher: While the record shows that the charge was served on the respondent February 3, 1949, it therefore appears clear to me that the events of October 25, 1948, the alleged events related in Paragraphs 10, as amended, and 11 of the complaint occurred well within six months prior to the service. I will therefore deny the motion on the authority of Cathey Lumber Company, 86 NLRB 30.

.

Trial Examiner Asher: I don't believe I have. Aside from the points already raised, Mr. Kass, do you have any other objections to the amendment of the complaint as submitted in writing by Mr. Bernstein, General Counsel's Exhibit 1-O?

Mr. Kass: We would like to reserve such right to file an appropriate reply to this amended answer prior to the termination of the formal proceedings.

Trial Examiner Asher: Very well, you can reserve such rights. With that understanding that the respondent shall have a right to answer the amended complaint before the termination of the formal hearings with that reserva-

tion the amendment is granted and Exhibit 1-O will be introduced into evidence.

(Whereupon, document previously marked for identification as General Counsel's Exhibit 1-O, was received in evidence.)

Mr. Bernstein: Will you mark this for identification, Mr. Reporter?

(Whereupon, document referred to was marked for identification as General Counsel's Exhibit No. 2.)

Mr. Bernstein: I now offer in evidence as General Counsel's Exhibit 2 a copy of a contract between Gaynor News [fol. 66] Company and the union dated October 25, 1948 which has heretofore been marked for identification as General Counsel's Exhibit No. 2. This is a conformed copy.

Trial Examiner Asher: Have you seen it, Mr. Kass?

Mr. Kass: No.

Trial Examiner Asher: Is there any objection, Mr. Kass?

Mr. Kass: None whatsoever.

- Trial Examiner Asher: Is there any objection, Mr. Duker?

Mr. Duker: No objection.

Trial Examiner Asher: Hearing no objection, General Counsel's Exhibit No. 2 is admitted in evidence.

(Whereupon, document previously marked for identification as General Counsel's Exhibit No. 2, was received in evidence.)

.

Mr. Bernstein: At this time counsel for the General Counsel moves to strike that portion of the union's answer entitled "And for a first separate and distinct defense," consisting of paragraph No. 3, as frivolous, irrelevant, immaterial, incompetent and insufficient in law, and in support of this motion—

Will you mark this General Counsel's Exhibit 3, please?

(Whereupon, document referred to was marked for identification as General Counsel's Exhibit No. 3.)

Mr. Bernstein: I ask that the Trial Examiner and the Board take official notice of its own records in the matter of Suburban Wholesalers Association, Case No. 2-UA-4890. To facilitate that process I wish to offer in evidence a copy of the petition in that named and numbered case as General Counsel's Exhibit No. 3, which has heretofore been marked.

[fol. 67] Trial Examiner Asher: Have you seen that, Mr. Kass?

Mr. Kass: No, sir.

Trial Examiner Asher: Will you pass that over to Mr. Kass?

(Paper handed to Mr. Kass.)

Mr. Kass: Would the counsel for the General Counsel give us—I am not familiar with these forms—would he give us some indication of what this is about so I know what to look for here?

Mr. Bernstein: Certainly, Mr. Kass. I was going to call the attention of the Trial Examiner to the fact that this petition for an election to authorize the union, Newspaper and Mail Deliverers' Union of New York and Vicinity, to authorize that union to enter into a union security agreement within the limitations provided by the Act. It will be noted that this petition which is the first, so far as I know, was filed on January 11, 1949, several months after the execution of the contract which is General Counsel's Exhibit 2.

.

Mr. Bernstein: I wish also to refer the Trial Examiner to a portion of that exhibit which is referred to as the annex, in which there is named Gaynor News Company, 125 South 5th Avenue, Mount Vernon, New York.

Mr. Reporter, will you mark this for identification?

(Documents referred to were marked for identification as General Counsel's Exhibits 4-A and 4-B.)

Mr. Bernstein: Further in support of this motion I wish to ask the Trial Examiner and the Board to take official notice of the Board's files and records in the mat-

[fol. 68] ter of Gaynor News Company, Case No. 2-UA-5448 and wish to offer in evidence what has heretofore been marked as general Counsel's Exhibits 4-A and 4-B, consisting respectively of a union authorization petition, Mr. Kass, dated December 19, 1949, in that named and numbered case and a withdrawal request in that named and numbered case which was approved on January 4, 1950. I now offer General Counsel's Exhibits 3, 4-A and 4-B.

Mr. Kass: May I ask the purpose again of the General Counsel?

Trial Examiner Asher: Mr. Bernstein.

Mr. Bernstein: Yes. I wish to note that the answer alleges, that the union's answer alleges that the Regional Director and the Board were dilatory and otherwise improperly delayed the processing of petitions, union authorization petitions which had been filed by the union. It is quite clear that at no time prior to the execution of the contract named in Section 10 of the complaint had the union attempted to secure the requisite authority.

* * * * *

Trial Examiner Asher: Are you stating that proof that they filed a petition on January 11, 1949 is in itself proof that they never filed one before that?

Mr. Bernstein: No. I also stated at the beginning that I asked the Trial Examiner—I believe I stated this—to take official notice of the fact that these were the earliest petitions filed.

Mr. Kass: Mr. Examiner, how can you take judicial notice that these were the earliest petitions filed?

Trial Examiner Asher: Because the Board records will show all petitions filed.

* * * * *

[fol. 69] Trial Examiner Asher: I think we have settled that. Very well, in view of the fact that the Trial Examiner will confine himself strictly to formal files that are open to public inspection, the motion requesting the Trial Examiner to take judicial [44] notice is granted with that restriction. And furthermore, General Counsel's Exhibits 3, 4-A and

4-B are admitted into evidence for whatever they may be worth.

(Whereupon, documents previously marked for identification as General Counsel's Exhibits 3, 4-A and 4-B, were received in evidence.)

• • • • •

Mr. Bernstein: Mr. Examiner, just before proceeding I would like to refer to General Counsel's Exhibit 4-A which has been received in evidence and I would like it to appear for the record that in that petition the union herein alleged that Gaynor News Company was engaged in commerce within the meaning of Section 2, subsection 6, of the Act, a matter as to which it claims it has insufficient knowledge on which to base a belief in its answer.

Trial Examiner Asher: Will you be kind enough to refer the Trial Examiner to the section?

Mr. Kass: Mr. Examiner, for the sake of the record and for the sake of saving time, Gaynor News Company stipulates that for the purposes of this action it is subject to the jurisdiction of the Act of the National Labor Relations Board.

Trial Examiner Asher: Is that stipulation acceptable?

Mr. Bernstein: It is acceptable to me. Unfortunately, the union is not here to answer to it, and from its answer the allegations on which that is based are not admitted and therefore I feel that it will be necessary to go into the proof on that matter.

[fol. 70] Trial Examiner Asher: The stipulation will be received in so far as it is a stipulation between the respondent and the General Counsel.

Mr. Bernstein: You were asking me something, Mr. Examiner?

Trial Examiner Asher: Yes, I was asking you to refer me to the section of the petition which refers to commerce. I see that Section 4, Nature of Employer's Business, describes newspaper and magazine delivery.

Mr. Kass: Mr. Examiner, may I at this time say that Mr. Gaynor of the Gaynor News Company is here and has been here all afternoon. Now he's trying to run his business, and if there is any evidence that is required of him,

I wonder if he could be called out of turn so that he may testify and be excused.

Mr. Bernstein: I was about to call him right now. I will withdraw my statement. The petition referred to, General Counsel's Exhibit 4-A, does not effectively make that allegation.

Trial Examiner Asher: Very well, proceed.

Mr. Bernstein: Will Mr. James B. Gaynor take the stand, please?

JAMES B. GAYNOR was called as a witness by and on behalf of the General Counsel, and having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bernstein:

Q. Mr. Gaynor, are you appearing here under subpoena?

A. I am.

Q. Are you employed by the Gaynor News Company, Inc.?

A. Yes.

[fol. 71] Trial Examiner Asher: Will you speak up, please?

The Witness: I am.

Q. In what capacity?

A. President.

.

Q. Mr. Gaynor, is the Gaynor News Company, Inc. a member of an Association?

A. It is.

Q. Would you tell me the name of that Association?

A. The Suburban Wholesalers.

Q. I ask you to direct your attention to the annex to General Counsel's Exhibit 3 and ask you whether that sets forth the names of the members of that Association (handing paper to the witness)?

A. Yes, I believe it does.

Mr. Bernstein: I would ask the Trial Examiner to note that that annex sets forth the names of several companies. One further question before that.

Q. Are the companies listed there at the locations which the annex sets forth? Are they placed in the proper states?

A. Yes, I would say they are in the proper states.

Mr. Bernstein: I ask the Trial Examiner to note that the Association is composed of members which have their places of business in the States of New York and New Jersey.

Trial Examiner Asher: The Examiner will so note. Continue.

Q. Mr. Gaynor, I show you General Counsel's Exhibit 2. That contract was signed by you, was it not?

A. I presume this is a copy of the contract that was signed by me.

Q. Did you participate in the negotiation of that contract?

A. Yes.

.

By Mr. Bernstein:

Q. Mr. Gaynor, I once again show you General Counsel's [fol. 72] Exhibit No. 2, in evidence, and ask you whether that is still in force and effect between the Respondent and the Newspaper and Mail Deliverers' Union of New York and Vicinity. I might point out, Mr. Gaynor, that that has already been received in evidence, and I am merely asking whether the contract which has been identified is still in force?

A. Oh, yes, that is still in force.

.

TRANSCRIPT OF TESTIMONY AT HEARING OF JULY 18, 1950

.

JAMES B. GAYNOR, resumed the stand and testified further as follows:

Direct examination (Continued):

.

Mr. Kass: May I for the record now make clear that the respondent, Gaynor News Company, will never raise any question in this case with reference to the interstate character of its business. It reiterates and restipulates that it is subject to the Act, and openly here at this hearing says that it never will raise any question involving the jurisdiction of the Board.

Trial Examiner Asher: Do we have such a stipulation on the record, incidentally, between the respondent and General Counsel? If not, this is an offer to stipulate.

Mr. Bernstein: I will so stipulate.

Trial Examiner Asher: All right, it is stipulated between the respondent and General Counsel that the respondent is [fol. 73] engaged in interstate commerce within the meaning of the Act. Is that correct?

Mr. Kass: That's correct.

.

Q. In the year 1949, Mr. Gaynor, did Gaynor News Company, Inc. grant vacations to employees doing the work of chauffeurs, distributors, routemen, tiers, floor men, wrapper-writers, relay men?

.

A. To the best of my knowledge I believe that vacations were given in accordance with our present contract.

Trial Examiner Asher: With pay is that?

The Witness: Yes.

Q. Were such payments made on the same basis to union employees and non-union employees?

A. Offhand I would believe so. I have not checked the records on that.

.

Mr. Bernstein: Would you mind marking this as General Counsel's Exhibits 9-A and 9-B.

(The documents above referred to were marked General Counsel's Exhibits 9-A and 9-B, for identification.)

Mr. Bernstein: I ask the Trial Examiner and the Board to take official notice of its records in the matter of Gaynor News Company, Inc. Case No. 2-UA-4273 and to facilitate that process, I am offering in evidence as General Counsel's Exhibits No. 9-A and 9-B, a copy of the petition in that case, and a copy of the withdrawal request that was approved by the Regional Director in that same named case.

Trial Examiner Asher: Is there any objection to the [fol. 74] admission of General Counsel's Exhibits 9-A and 9-B, Mr. Kass?

Mr. Kass: Well, I thought that in view of the fact that this involves a matter concerning the union, that the union ought to answer first.

Trial Examiner Asher: Well, the union isn't here to express any objections it might have.

Mr. Kass: In view of that fact, I have no objection on behalf of Gaynor News Company.

Trial Examiner Asher: Hearing no objections, General Counsel's Exhibits 9-A and 9-B will be received into evidence. In view of the fact of their introduction the Trial Examiner will have a further question to ask of the witness.

(The documents heretofore marked General Counsel's Exhibits 9-A and 9-B for identification, were received in evidence.)

* * * * *

James B. Gaynor re-called:

Trial Examiner Asher: Mr. Gaynor, I show you General Counsel's Exhibit 2, the contract between the union and Gaynor News and ask you to look at paragraph 19-a. Have you looked at that, sir?

The Witness: Yes, sir.

Trial Examiner Asher: Can you tell me whether or not, to your knowledge, what the expiration date of the contract between the union and the Publishers Association of New York might be that is referred to in paragraph 19-a?

The Witness: The expiration date of the Publishers contract?

[fol. 75] Trial Examiner Asher: That's right, sir.

The Witness: I believe the expiration date would have been——

Mr. Kass: October 25, 1950.

The Witness: Are you asking the expiration date of the present contract?

Trial Examiner Asher: No, of the contract referred to in Section 19-a.

The Witness: October 25, 1950.

Trial Examiner Asher: That is to the best of your knowledge?

The Witness: Expiration date of the Publishers contract.

.

Mr. Bernstein: Mr. Santomenna, take the witness stand, please.

DOMINICK SANTOMENNA, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Bernstein:

Q. What is your address?

A. Home address?

Q. Home address.

A. 14 Winslow Circle, Tuckahoe, New York.

Q. By whom are you employed?

A. Gaynor News Company.

.

Q. In what capacity?

A. Assistant supervisor.

Q. Mr. Santomenna, in 1949 did Gaynor News Company, Inc. make or award vacations to employees in the delivery department?

A. In 1949?

[fol. 76] Q. 1949?

A. Yes, they did.

Q. Were they granted to all employees equally, whether they were members of Newspaper and Mail Deliverers' Union of New York and Vicinity or not members of that organization?

A. Yes, yes.

Q. Were vacations granted to employees in the delivery department in 1948?

A. Yes, sir.

Q. Were vacation payments in lieu of actual vacation made to employees in the delivery department for the year 1948 after October 25, 1948?

A. I don't remember that. I couldn't answer that definitely right now.

Q. You could not answer that definitely?

A. No. In 1948, did you say?

Q. 1948.

A. Just repeat that question, please.

Q. Were vacation payments made to employees in the delivery department in lieu of vacations?

A. Instead of taking their vacations, work it out?

Q. That's correct, yes, after October 25, 1948?

A. Yes.

Q. Were such payments made to all employees whether or not they were members of the union?

A. As far as I understand, yes.

• • • • •

LEON ASCHE, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Bernstein:

Q. What is your address, please?

A. 231 South Fulton Avenue, Mt. Vernon, New York.

Q. Mr. Asche, are you an employee of the Gaynor News Company, Inc.?

A. Yes, I am.

[fol. 77] Q. In what capacity are you employed?

A. Manager of the bookkeeping department.

Q. How long have you held that position?

A. About 9 years.

Q. What are your duties as the manager of the bookkeeping department?

A. To supervise the keeping of the books and the payrolls for the Gaynor News Company.

Q. Does that include the supervision of all payments that are made to employees?

A. Right.

Q. In 1949, Mr. Asche, did Gaynor News Company, Inc. grant vacations to its employees?

A. Yes.

Mr. Kass: I object to the question on the ground that it is beyond the scope of the complaint.

Mr. Bernstein: The Examiner has already ruled on it in connection with other witnesses.

Trial Examiner Asher: Yes, I will overrule the objection for the same reasons that I gave before, subject, however, to a motion to strike if it isn't tied in. I believe that was my ruling last time.

Mr. Kass: That's right, sir.

Q. The answer was yes?

A. I believe it was yes.

Q. Were such payments made equally to the members of the Newspaper and Mail Deliverers' Union of New York and non-members of that organization?

A. What year?

Q. 1949.

A. I believe yes.

.

By Mr. Bernstein:

Q. Mr. Asche, in 1948, sometime after October 25, were payments made to employees in the delivery department of Gaynor in lieu of vacations?

A. 1948?

Q. After October, 1948.

A. Yes, sir, I believe so.

[fol. 78] Trial Examiner Asher: Will you speak up, please, Mr. Asche?

The Witness: The answer is yes.

Q. And such payments were made before January 1, 1949?

A. I don't believe so.

Q. At what date were vacation payments for the year 1948 made?

A. They started January, 1949.

Q. At what date were payments made for vacations earned in 1947?

A. In 1948.

Q. When in 1948?

A. Started January, 1948.

Q. What vacation payments were made starting in January 1, 1948?

A. What vacation payments were made?

Q. That's right. What was the basis for the payments?

A. The basis? Well, the basis was for the number of days worked in '47.

Q. Such vacations were actually taken; is that correct?

A. That's right.

Q. Up to October 25, 1948. Were additional payments made for vacations earned in 1947 after October 25, 1948?

A. Additional vacations for 1947?

Q. That's right.

A. I don't recollect that. I believe there was.

Mr. Kass: Mr. Examiner, so that we can save time, to explain the situation, the contract prior to General Counsel's Exhibit 2 provided for two weeks vacation. By virtue of the contract identified as General Counsel's Exhibit 2 a three-week vacation was provided for. Because of the fact that it had been established as general practice in other branches of the industry, and despite the fact that under the contract we were not obligated to give our employees a [fol. 79] third week of retroactive vacation, in the interests of good labor relations and to maintain peace with the union, and not to have a different standard apply throughout the industry, we voluntarily granted those of our employees who were with us a third week's vacation.

Trial Examiner Asher: This is an actual vacation period, and not pay in lieu of vacation?

Mr. Asche: We gave them the money.

Trial Examiner Asher: You paid them in lieu of that extra vacation?

Mr. Kass: That's right.

Trial Examiner Asher: Is that offered as a stipulation?

Mr. Kass: I don't know how to denominate my representations here any more.

Trial Examiner Asher: Suppose I just ask the witness if that is a correct statement, if he knows. Do you know if the statement that Mr. Kass just made is a correct statement?

The Witness: Yes, it is.

Mr. Bernstein: I object to the question being put to the witness in as much as it contains self-serving declarations, conclusions of law, as to what the contract called for, and things of that sort.

Mr. Kass: All self-serving declarations and conclusions of law implied within the statement are expunged, nullified, *nunc pro tunc* and of no effect whatsoever.

Trial Examiner Asher: I am going to withdraw my question. I thought maybe I could help matters along here, but I see that it did not have that effect.

[fol. 80] Are you offering that as a stipulation?

Mr. Kass: I would like it to be accepted as a stipulation.

Trial Examiner Asher: Will you join in that stipulation?

Mr. Bernstein: I would prefer to continue with the examination of the witness.

Mr. Kass: I am sure it will take an hour for it to be clarified by a question and answer situation, and I can clear it up in three minutes.

Trial Examiner Asher: You see that was what I was attempting to do with my question. Maybe we could work it that way, but Mr. Bernstein, it is entirely up to you how you want to go about it.

Mr. Bernstein: I prefer to ask questions.

By Mr. Bernstein:

Q. After October 25, 1948, Mr. Asche, were more generous vacations given to employees in the delivery room?

A. What do you mean by more generous vacations?

Q. Just a moment, let me finish the question—than had been contemplated on January 1, 1948?

A. You mean if a third week was given to employees of the delivery department, I would say yes.

Q. And the third week was based upon a full year's work; is that correct?

A. That's right.

Q. Now, if an employee had worked less than a full year in 1947, vacation credit was pro-rated?

Mr. Kass: I object to the question on the ground that it is argumentative, that Section 9 of Exhibit No. 2 speaks for itself.

Mr. Bernstein: I am asking what was done, not what was [fol. 81] provided for. You can contract all day and not do anything.

Trial Examiner Asher: I will overrule the objection and allow the witness to answer the question.

A. That question is hard to answer because I haven't got all the records here.

Q. Let me show you Schedule B of General Counsel's Exhibit No. 2 and ask you whether that schedule was followed after October 25, 1948?

A. That schedule was followed. The vacation pay for 1947 was based on this schedule.

Q. Prior to October 25, 1948 were vacations granted according to a schedule that provided for less vacations to employees in the delivery room for the year 1948?

.

A. I would like to clear this up. You mean vacation?

Q. That were granted in 1948.

A. They were based on a two-week schedule on days worked in 1947.

Q. However employees who worked for less than a whole year in 1947 got vacations of less than two weeks; is that correct?

A. According to the schedule.

Q. After October 25, 1948, were the additional benefits granted to both members of the Newspaper and Mail Deliverers' Union of New York and Vicinity and to non-members of that organization?

.

A. You mean the additional vacation benefits?

Q. That's correct.

A. The answer is no.

[fol. 82] Q. To whom was that granted?

A. Union members only.

Q. To whom were they not granted?

A. Non-union members.

Q. At that time was Sheldon A. Loner an employee of Gaynor News Company, in the fall of 1948?

A. Yes, he was.

Q. Could you tell me how many days he worked in the year 1947?

A. How many days he worked?

Q. How many days?

A. Can I look at my exhibit here?

Q. You may.

A. According to my records it was 101 days in 1947.

Q. Did Mr. Loner receive any vacation in 1948?

A. No.

Q. Was Mr. Loner employed after October 25, 1948?

A. Yes, for a short while.

Q. Could you give me the beginning and terminal dates starting with October 25.

A. The termination date was 12/3/48.

Trial Examiner Asher: What was that date again?

The Witness: 12/3/48.

Q. Was Mr. Loner a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity?

A. As far as I know, no.

.

Q. How many non-union employees were there working in the delivery room in the period October 25, 1948 to January 1, 1949?

Mr. Kass: There is no testimony that this witness knows.

A. I don't know offhand.

Trial Examiner Asher: Of course, I take it that the witness realizes that if there is a question asked him that he [fol. 83] does not know the answer, he is free to reply, "I do not know". I will so instruct the witness.

The Witness: I don't know offhand.

Q. Was there more than one?

A. Yes.

Trial Examiner Asher: That is non-union employees you are talking about?

Mr. Bernstein: Non-union employees.

Q. Was Mr. Loner given any payment in lieu of vacation in 1948?

A. No.

Q. Were the other non-union employees given any payment in lieu of vacation payment in the year 1948?

A. No.

.

By Mr. Bernstein:

Q. Were there other non-union employees employed in the delivery department in the fall of 1948 who had worked more than fifteen days in the year 1947?

A. I believe yes.

Q. Was there more than one?

A. Yes.

Mr. Kass: I have a standing objection to this line of testimony.

Trial Examiner Asher: That's correct, sir; the record will so show.

Q. Were retroactive wage payments made to employees in the fall of 1948?

A. Yes.

Q. On approximately what date was that payment made?

A. I don't have the exact date. I believe it was made in November.

Q. During the month of November?

A. November, I believe.

Trial Examiner Asher: That is 1948?

The Witness: 1948, right.

[fol. 84] Q. And did that retroactive wage payment cover the period from July 17, 1948 to October 25, 1948?

A. I believe so.

* * * * *

Q. In what manner was the retroactive wage payment computed, Mr. Asche?

A. Well, the manner it was paid was the difference between the old rate of \$14.96 a night and the new rate which was \$16.41 a night.

Q. And that was for each day worked between July 17, 1948 and October 21, 1948; is that correct?

A. That's right.

Q. And the difference between those two rates is \$1.45 per day; is that correct?

A. Yes.

Q. Were additional payments made for overtime work during that period, July 17, 1948 to October 25, 1948?

A. You mean additional retroactive overtime?

Q. That's correct.

A. That's right.

Q. Would you tell me how that was computed?

A. Well, we computed the rate per hour at time and a half.

Q. And the difference between the two rates per hour was the difference paid for each overtime hour; is that correct?

A. That's right.

Q. If hours were worked in excess of four hours over in one night, would a full day's payment of \$1.45 be made for that overtime?

A. An excess of four hours?

Q. That's correct.

A. No.

Q. Merely an hourly rate of pay?

A. An hourly overtime rate was paid.

Q. Which represented the difference between the hourly overtime rates?

A. Yes.

[fol. 85] Trial Examiner Asher: Those figures of \$16.41 and \$14.96 respectively were for a standard eight-hour day?

The Witness: Right.

Trial Examiner Asher: So that the difference of \$1.45 per day is more or less a difference of 18 cents per hour straight time?

The Witness: I believe so.

Trial Examiner Asher: Or 27 cents per hour overtime?

The Witness: Right.

Q. To whom were such payments made?

A. Union men.

Q. Were any such payments made to non-union men?

A. No.

Q. Did Sheldon Loner work from the period July 17, 1948 to October 25, 1948?

A. Yes.

Q. Did other non-union men work during the period July 17, 1948 to October 25, 1948?

A. I believe so.

Mr. Bernstein: I have no further questions to ask of this witness.

Trial Examiner Asher: Mr. Kass, cross examination?

Mr. Kass: No questions.

Trial Examiner Asher: Mr. Asche, you have testified that certain payments were made to union men only. How did you know which men were union and which men were not in order to determine whether to make payments to them or not?

The Witness: I was told through Mr. Gaynor.

Trial Examiner Asher: Did Mr. Gaynor supply you with a list?

[fol. 86] The Witness: With a record, not with a list. We were supplied with employees record cards which are marked union if they are union.

Trial Examiner Asher: Do you have such a record card for each employee on the payroll?

The Witness: That's right.

Trial Examiner Asher: And opposite each employee's name on these cards is shown whether or not he is a union member?

The Witness: That is the only way I know of, who are members and who are not.

Trial Examiner Asher: You have seen those cards?

The Witness: Yes.

Trial Examiner Asher: And you used those cards as a guide?

The Witness: Right.

.

Trial Examiner Asher: Let me ask Mr. Kass some questions. Assuming for the purpose of argument that Mr. Loner had attempted to become a member of the union, and had been unsuccessful in doing so, what is your theory as to how that would affect the question of whether or not the respondent is guilty of unfair labor practices?

Mr. Kass: I can state that very simply. I know as a matter of fact that Mr. Loner had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member of this union because of the restrictions of the union upon [fol. 87] its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encourage him to membership because he was already trying to become a member of that union. And that is our case.

.

SHELDON LONER was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Kass:

Q. Where do you live, Mr. Loner?

A. 1495 Plimpton Avenue, in the Bronx.

Q. How old are you?

A. Twenty-three.

Q. Where do you work?

A. At the present time?

Q. That's right.

A. S. G. Products, 1220 Broadway.

Q. For how long were you an employee of the Gaynor News Company?

A. Approximately a year and a half.

.

A. Well, it seems natural that I did make a demand. I asked them for it—not exactly.

Q. Who did you ask for the money?

A. The party.

Q. Yes.

A. I spoke to Mr. Murray Levine.

Q. Who is Mr. Murray Levine?

A. He is the foreman.

Q. When did you speak to him?

A. I'd say it was within a couple of days after the retroactive pay was given.

[fol. 88] Q. Well, what date was that?

A. Sometime in the middle of November, 1948.

Q. So that sometime in the middle of November, a few days after the retroactive pay was paid you asked Murray Levine for your money; is that correct?

A. No.

Q. What did you do?

A. I asked Murray Levine, "Do I get retroactive pay?"

Q. What did he say to you?

A. He said I was not entitled to it since I wasn't a member of the union.

Q. You weren't a member of the union, were you?

A. No.

.

JAMES B. GAYNOR re-called on behalf of the Respondent:

Trial Examiner Asher: I will remind you, Mr. Gaynor, you are still under oath.

Direct examination:

By Mr. Kass:

Q. I show you a copy of contract dated 2nd day of January, 1946 between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity and ask whether this is a true copy of the collective bargaining agreement negotiated between your company and the union?

A. This is a true copy.

Mr. Kass: I offer the exhibit in evidence, Exhibit 1 on behalf of the respondent.

.

Mr. Bernstein: I have no objection to Respondent's Exhibit 1.

Trial Examiner Asher: Hearing no objections, Respondent's Exhibit 1 is received in evidence.

[fol. 89] (The document heretofore marked Respondent's Exhibit No. 1 for identification, was received in evidence.)

Q. Mr. Gaynor, I show you supplementary agreement between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity, dated October 18, 1948, and ask whether that is a true copy of the agreement executed by Gaynor News Company and the union?

Trial Examiner Asher: Suppose we mark that Respondent's Exhibit 2 for identification?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

A. It is.

Mr. Kass: I offer it in evidence. May I say it was returned to us by the Examiner, Mr. Eisenberg at the same time that Exhibit 1 Respondent was returned. It was attached thereto.

Mr. Bernstein: No objection.

Trial Examiner Asher: Hearing no objection Respondent's Exhibit 2 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 2 for identification, was received in evidence.)

.

Q. Do you have personal knowledge, Mr. Gaynor, as to the payments made to your employees by virtue of contracts?

A. I do.

.

Q. I am making reference to retroactive wage payments made to union employees for the period covering July 17, [fol. 90] 1948 to October 24, 1948. Were those payments made to the members of the union in your employ at your direction?

A. They were.

.

Q. Mr. Gaynor, were you the official of the Gaynor News Company who issued the orders that after the effective date of the present contract, the one dated October 24, 1948 and identified in the proceedings as General Counsel Exhibit No. 2, are you the official of the company who issued orders not to give increased vacation benefits to non-union employees?

A. Would you read that question back?

(Question read.)

A. Yes, I am.

.

TRANSCRIPT OF HEARING OF JULY 19, 1950

.

JAMES B. GAYNOR resumed the stand, and further testified as follows:

Cross-examination.

By Mr. Bernstein:

Q. Mr. Gaynor, you were actively engaged in the operation of Gaynor News Company, Inc., in January 1946?

A. I was.

Q. And you have been since that time?

A. That is correct.

[fol. 91] Q. Mr. Gaynor, in 1946, prior to the execution of the contract which is Respondent's Exhibit No. 1 in evidence, were there non-union employees employed in the delivery department of Gaynor?

A. I believe that there were.

Q. And were there non-union employees from that time to the present always employed in the delivery department of Gaynor?

A. I believe that is correct.

.

Mr. Kass: Mr. Examiner, may I invite your attention to the fact that there are no allegations in the complaint challenging the validity of the contract dated July 2, 1946? This complaint questions the legality of the current contract, the one executed October 25, 1948. There are no allegations whatsoever with reference to the old contract.

We attempted to show you yesterday, and there was strenuous objection by counsel for the General Counsel to the open and honest admission of testimony when the complaining witness, Sheldon Loner, was on the stand, and I hope that you recall that I asked him whether he was a member of the union, whether he had tried to become a member of the union, and I wanted to introduce testimony which brought into the open the entire question of what this complaining witness wanted to do with reference to the union.

Counsel for General Counsel, for reasons best known to himself, wanted to hide the full facts from the examiner, and evidently from the courts. What could be gained by that concealment is beyond my comprehension. But, anyway, he made the concealment, and he wanted to hide the facts.

[fol. 92] We wanted to tell you yesterday that by virtue of that agreement of January 2, 1946, we had a contract where we were bound to employ exclusively members of the union, and we wanted to tell you that by virtue of that contract, when Sheldon Loner took a job there, when he got that job through the aid and assistance of the business agent of the union, Leon Bronstein, who, again, the counsel for the General Counsel did not permit to testify, to give you the entire facts—this boy knew that he could be bumped out of his job when a union man applied for the job. That was the contract and that was the law, under the old Wagner Act. The Colgate-Palmolive-Peet case, which I cited to you yesterday, decided by the United States Supreme Court on December 5, 1949, in a strong opinion by Judge Minton, upheld the validity of that contract and ruled that the policy of the Board, where they attempted to attack that type of contract and discharges under that type of contract, was censorable.

• • • • •

[fol. 53]

Form NLRB-501
(12-48)

GENERAL COUNSEL'S EXHIBIT 1-A.
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

Budget Bureau No. 64-ROO 1.1
Approval Expires Nov. 30, 1949

IMPORTANT—READ CAREFULLY

DO NOT WRITE IN THIS SPACE

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer	Gaynor News Co. Mt. Vernon 4-4000	No. of Workers Employed 60
Address of Establishment (Street and No., City, Zone and State)	125 South 5th Avenue, Mount Vernon, New York	Nature of Employer's Business Distribution of Newspapers and Periodicals

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.
(List subsections)

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

Since July 20, 1947, and at all times thereafter, the above-named employer has paid the undersigned lower wages than members of the Newspaper and Mail Deliverers Union, hereinafter called the Union, and has refused to pay the undersigned the retroactive pay for the period from July 17, 1948 to October 31, 1948, and the vacation and premium holiday pay that it paid members of the Union, for the reason that the undersigned was not a member of the Union and has thereby encouraged membership in the Union in violation of Section 8 (a) (3) of the Act.

[fol. 94]

By the above acts and by each of said acts, the above-named employer has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) thereof.

(Received 12:55)
 (Feb. 1 1949)
 (Second Region)
 (New York, N. Y.)
 (NLRB)

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
 Sheldon A. Loner

Telephone No.
 Je 7-9591

4. Address (Street and No., City, Zone, and State)
 1495 Plimpton Avenue, Bronx, New York

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

Telephone No.

6. Address of National or International, if any (Street and No., City, Zone, and State)

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.
 By SHELDON A. LONER
 (Signature of representative or person filing charge)

(Title, if any)

(Date)

Willfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 95]

Form NLRB-501
(12-49)

GENERAL COUNSEL'S EXHIBIT 1-D.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
AMENDED CHARGE AGAINST EMPLOYERBudget Bureau No. 64-ROO 1.1
Approval Expires Nov. 30, 1950

IMPORTANT—READ CAREFULLY

DO NOT WRITE IN THIS SPACE

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Case No.

2-CA-605

Date Filed

6/8/50

Compliance Status Checked By:

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer

GAYNOR NEWS CO., INC.

Address of Establishment (Street and number, city, zone and State)

125 South 5th Avenue, Mount Vernon, New York

Number of Workers Employed

60

Nature of Employer's Business
Distribution of Newspapers
and Periodicals

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

(List subsections)

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since August 1, 1948, and at all times thereafter, the above-named Employer has failed and refused to pay the undersigned the retro-active pay for the period from on or about July 17, 1948 to on or about October 31, 1948, and the vacation pay that it paid members of the Newspaper & Mail Deliverers Union of New York, and vicinity, for the reason that the undersigned was not a member of that Union, thereby encouraging membership in that Union in violation of Section 8(a) (3) of the Act.

[fol. 96]

By the above acts and by the execution, on or about October 25, 1948, of an illegal contract requiring membership in the aforementioned union, the above-named Employer has contributed illegal support to the aforementioned union in violation of Section 8(a) (2) of the Act.

By the above acts and by each of said acts, the above-named Employer has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a) (1) thereof.

(Received 9:30)
 (Jun 8 1950)
 (Second Region)
 (New York, N. Y.)
 (NLRB)

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
 SHELDON A. LONER

4. Address (Street and number, city, zone, and State)
 1495 Plimpton Avenue, Bronx, New York.

Telephone No.
 JE 7-9591

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Address of National or International, if any (Street and number, city, zone, and State)

Telephone No.

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By SHELDON A. LONER
 (Signature of representative or person filing charge)
 Sheldon A. Loner

June 6, 1950
 (Date)

(Title, if any)

Willfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 97] GENERAL COUNSEL'S EXHIBIT 1-H

United States of America

Before the

National Labor Relations Board

Second Region

In the Matter of Gaynor News Company, Inc., and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract.

Case No. 2-CA-605

Complaint

It having been charged by Sheldon A. Loner, 1495 Plimpton Avenue, New York, New York, that Gaynor News Company, Inc., 125 South Fifth Avenue, Mount Vernon, New York, herein referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61, Stat. 136, 29 U. S. C., Supp. I, Sec. 151, *et seq.*, herein referred to as the Act, the General Counsel of the National Labor Relations Board, [fol. 98] on behalf of the Board, by the Acting Regional Director for the Second Region, designated by the Board's Rules and Regulations—Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

1. A copy of the Charge herein was served by registered mail upon Respondent on February 3, 1949. A copy of the Amended Charge herein was served by registered mail upon Respondent on or about June 12, 1950.

2. Respondent is and has been since 1937 a corporation duly organized under and existing by virtue of the laws of the State of New York.

3. At all times herein mentioned, Respondent has maintained its principal office and places of business at 125 South Fifth Avenue and 225 South Fourth Avenue, in the City of Mount Vernon, County of Westchester, and State of New York, and is now and has been continuously engaged at

said places of business in the purchase, sale, wholesale distribution and delivery of newspaper-, magazines and periodicals.

4. During the year ending January, 1949 Respondent, in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its places of business in New York newspapers, magazines and periodicals valued in excess of \$500,000, of which approximately 1 percent was transported to its said places of business in New York in interstate commerce from states of the United States other than the State of New York.

5. During the year ending January, 1949 Respondent, in the course and conduct of its business operations, sold and delivered newspapers, magazines and periodicals [fol. 99] valued in excess of \$1,000,000, of which approximately 25 percent was transported from its said places of business in New York in interstate commerce to states of the United States other than the State of New York.

6. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

7. Newspaper and Mail Deliverers' Union of New York and Vicinity, herein referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

8. On or about October 25, 1948 Respondent instituted an increased wage rate and other benefits for those of its employees performing the operations of chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay and Canada men.

9. At all times herein mentioned Respondent did discriminate in regard to hire or tenure of employment of those of its employees in the categories set forth in paragraph 8 hereof who were not members of the Union, including Sheldon A. Loner, in that:

(a) In or about October or November, 1948 it paid to each of its employees in the categories described in paragraph 8 hereof who were members of the Union a sum of money as retroactive wages for the period from in or about July, 1948, to and including in or about October, 1948, and has failed and refused, and continues to fail and refuse, to pay similar retroactive wages to each of its employees in the categories described in paragraph 2 hereof who were

employed during that time and who were not members of the Union, including employee Sheldon A. Loner; [fol. 100] (b) In or about October or November, 1948, Respondent awarded and granted to each of its employees in the categories described in paragraph 8 hereof who were members of the Union vacation with pay or the equivalent pay in dollars therefor, and has failed and refused, and continues to fail and refuse, to award and grant similar vacations with pay or the equivalent pay in dollars therefor to each of its employees in the categories described in paragraph 8 hereof who were employed at that time and who were not members of the Union, including employee Sheldon A. Loner.

10. Respondent and the Union did on or about October 25, 1948 enter into a collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph 8 hereof, which agreement required as a condition of continued employment by the Respondent membership in the Union.

11. The agreement described above in paragraph 10, any amendment, modification, supplement, renewal or extension thereof is invalid and in violation of the Act and interferes with, restrains and coerces Respondent's employees in the exercise of rights guaranteed by the Act.

12. By the acts described above in paragraphs 8, 9, 10 and 11, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in paragraphs 8 and 9, thereby encouraging membership in the Union, and Respondent thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

[fol. 101] 13. By the acts described above in paragraphs 8, 9, 10 and 11, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a) (2) of the Act.

14. By the acts described above in paragraphs 8, 9, 10 and 11, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage

in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

15. The activities of Respondent, described above in paragraphs 8, 9, 10 and 11, occurring in connection with the operations of Respondent, described above in paragraphs 2, 3, 4, 5 and 6, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8(a) (1), (2), (3) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Second Region, on this 13th day of June, 1950 issues this Complaint against Gaynor News Company, Inc., respondent herein.

James A. Jaffee, Acting Regional Director, National Labor Relations Board, 2 Park Avenue, New York 16, New York.

[fol. 102] GENERAL COUNSEL'S EXHIBIT 1-M

United States of America

Before the

National Labor Relations Board

Second Region

In the Matter of Gaynor News Company, Inc. and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract.

Case No. 2-CA-605

Answer

An emended complaint having issued on the 13th day of June, 1950 by James A. Jaffee, Acting Regional Director, National Labor Relations Board, Second Region, against

6-371

Gaynor News Company, Inc., 125 South Fifth Avenue, Mt. Vernon, New York, herein referred to as "Respondent" alleging that Respondent has engaged in and is now engaged in certain unfair labor practices affecting commerce [fol. 103] as set forth and defined in the National Labor Relations Act, as amended, the Respondent, by its attorneys, Bandler, Haas & Kass, hereby answers the amended complaint as follows:

1. Admits the allegations of paragraphs numbered "1", "2" and "3".

2. Admits the allegations of paragraph numbered "4" and further alleges that its delivery, distribution and related activities were entirely confined to the State of New York.

3. Admits the allegations of paragraphs numbered "5", "6", "7" and "8".

4. Respondent denies the allegations of paragraph numbered "9".

5. Admits the allegations of paragraph numbered "9. (a)", except that it admits that it "refused to pay such sum" only in the sense that it failed to make such payment.

6. Admits the allegations of paragraph numbered "9. (b)", except that it admits that it "refused to grant such vacations" only in the sense that it failed to grant them.

7. Denies the allegations of paragraph numbered "10" except that it admits the entering into of the collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph numbered "8" of the complaint. [fol. 104]

8. Denies each and every allegation in paragraphs numbered "11", "12", "13", "14" and "15".

Dated: June 22, 1950.

Bandler, Haas & Kass, Attorneys for Respondent,
Office and P. O. Address, 11 Broadway, New York
4, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Richard L. Halpern, being duly sworn, deposes and says:

That he is associated with the firm of Bandler, Haas & Kass, attorneys for the Respondent, in the above entitled proceeding; that the reason why this verification is made by deponent and not by an officer of the Respondent is that such an officer is not at the present time within the City of New York and it is difficult to obtain verification by an officer of the Respondent within the time allowed for this answer; that the above answer is true to the knowledge of deponent.

Richard L. Halpern.

Sworn to before me this 22nd day of June, 1950.
Constance B. Willcher (Epstein), Notary Public,
State of New York. No. 30-9676750. Qualified in
Nassau County. Certs. filed in N. Y. Co. Clks. &
Reg. Off. Term Expires March 30, 1952.

[fol. 105] STATE OF NEW YORK,
County of New York, ss:

Carl Sichel, being duly sworn, deposes and says, that on the 22nd day of June, 1950, he served the within answer upon Sheldon A. Loner, the complainant in the within action, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Sheldon A. Loner, 1495 Plimpton Avenue, New
York, N. Y.

and by depositing the same in the post office box regularly maintained by the United States Government at 11 Broadway, Borough of Manhattan, City of New York.

Carl Sichel.

Sworn to before me this 22nd day of June, 1950.
Richard L. Halpern, Notary Public, State of New
York. No. 31-6742750. Qualified in New York
County. Certs. filed in N. Y. Co. Clks. & Reg. Off.
Commission Expires March 30, 1952.

GENERAL COUNSEL'S EXHIBIT 1-O

"10. (a) Respondent and the Union, by their respective officers, agents, and representatives, did on or about October 25, 1948, enter into a collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph 8 hereof, which agreement required as a condition [fol. 106] of continued employment by Respondent membership in the Union, and which otherwise provided for the preferential treatment of Union members.

"(b) Since on or about October 25, 1948, Respondent and the Union have continued the collective bargaining agreement described in paragraph 10(a) hereof in full force and effect."

GENERAL COUNSEL'S EXHIBIT 4-A

Budget Bureau No. 64-R002.2.
Approval expires July 31, 1950.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

COPY

IMPORTANT—READ CAREFULLY

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

ATTACHMENTS REQUIRED.—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

DO NOT WRITE IN THIS SPACE

Case No.
2-UA-5448

Date Filed
12/19/49

Compliance Status Checked By:

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

[fol. 107]

1. Purpose of this Petition (*Check only the one box which is appropriate*)

- A. ☐ RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.
- B. ☐ RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.
- C. ☐ RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in Section 9 (a) of the act.
- D. ☒ UA—UNION SHOP AUTHORITY.—(*If employer consents to union shop election, use form NLRB-510 instead of this Form NLRB-502.*) Petitioner is the representative of employees as provided in Section 9 (a) of the act and 30 percent or more of employees within a unit appropriate for such purposes desire to authorize Petitioner to make an agreement with their employer requiring membership in Petitioner as a condition of continued employment.
- E. ☐ UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8 (a) (3) (ii) of the act desire that such authority be rescinded.

2. Name of Employer

Gaynor News Co.

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State)

125 So. 5th Ave. Mt. Vernon, N. Y.

4. Nature of Employer's Business

Newspaper & Magazine Del.

5. Description of Unit Involved

INCLUDED

All routemen, drivers, floormen in delivery department.

EXCLUDED

Supervisory, clerical, professional employees and guards.

6a. Number of Employees in Unit

approximately 40

6b. Number of Employees Supporting this Petition

5

(*If you have checked box 1A (RC) above, check and complete EITHER item 7a or 7b, whichever is applicable*)

[fol. 108]

- 7a. [] Request for recognition as Bargaining Representative was made on and Employer declined recognition on or about
 (Month, day, year) (If no reply received, so state)
 (Month, day, year)
- 7b. [] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME

Newspaper & Mail Deliverers' Union

AFFILIATION

ADDRESS

DATE OF RECOGNITION OR
CERTIFICATION

63 Park Row

Oct. 25, 1949

(Month, day, year)

None New York 7, N. Y.

9. Date of Expiration of Current Contract, if any

January 24, 1951

(Month, day, year)

(Fill in Item 10 Only if You Have Checked Box 1E (UD) ABOVE)

10. Date of Election by Which Union Shop Authority Was Granted

(Month, day, year)

11. Parties or Organizations Which Have Claimed Recognition as Representatives (If none, so state)

NAME

AFFILIATION

ADDRESS

DATE OF CLAIM

None

12. Other Unions Interested in the Employees Described in Item 5 Above (If none, so state)

NAME

AFFILIATION

ADDRESS

None

13. Declaration

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner

Newspaper & Mail Deliverers' Union of N. Y. & Vicinity

Affiliation, if any.....

By

Charles Weinberg

Sec. Treas.

(Signature of representative or person filing petition)

(Title, if any)

Address

Row, New York 7, N. Y.

Rector 2-6135

(Street and number, city, zone, and State)

(Telephone number)

Willfully False Statement on This Petition Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 109] GENERAL COUNSEL'S EXHIBIT 4-B

United States of America

National Labor Relations Board

Withdrawal Request

(Name of case): In the matter of Gaynor News Co.
(Number of case): 2-UA-5448.

This is to request withdrawal of the (petition) [charge]*

(Name of Party Filing): Newspaper and Mail Deliverers'
Union of New York and Vicinity.

By (S.) Charles Weinberg, Sec'y-Treas.

Date 12/29/49.

Withdrawal request approved Jan. 4, 1950.* (S.) Charles
T. Douds, Regional Director, National Labor Relations
Board.

*Struck out in Copy.

[fol. 110]

GENERAL COUNSEL'S EXHIBIT 9-A.

Budget Bureau No. 64-R002.2.
Approval expires July 31, 1950.
COPY

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
PETITION

IMPORTANT—READ CAREFULLY

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

ATTACHMENTS REQUIRED.—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

DO NOT WRITE IN THIS SPACE

Case No.
2-UA-4273

Date Filed
8/16/48

Compliance Status Checked by:

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition (*Check only the one box which is appropriate*)
 - A. ☐ RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.
 - B. ☐ RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.
 - C. ☐ RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in Section 9 (a) of the act.
 - D. ☒ UA—UNION SHOP AUTHORITY.—(*If employer consents to union shop election, use form NLRB-510 instead of this Form NLRB-502.*) Petitioner is the representative of employees as provided in Section 9 (a) of the act and 30 percent or more

[fol. 111]

of employees within a unit appropriate for such purposes desire to authorize Petitioner to make an agreement with their employer requiring membership in Petitioner as a condition of continued employment.

- E. [] UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8 (a) (3) (ii) of the act desire that such authority be rescinded.

2. Name of Employer Gaynor News Co.		
3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State) 125 S. 5th St. Mt. Vernon, N. Y.		
4. Nature of Employer's Business Newspaper & Magazine distributor		
5. Description of Unit Involved		
INCLUDED Drivers, routemen and loaders		
EXCLUDED Foremen, clerical, guards and professional employees.		
6a. Number of Employees in Unit 55		
6b. Number of Employees Supporting this Petition 49		
(If you have checked box 1A (RC) above, check and complete EITHER item 7a or 7b, whichever is applicable)		
7a. [] Request for recognition as Bargaining Representative was made on and Employer declined recognition on or about (Month, day, year) (If no reply received, so state) (Month, day, year)		
7b. [] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.		
8. Recognized or Certified Bargaining Agent (If there is none, so state)		
NAME Newspaper and Mail Deliverers Union of New York and Vicinity.		
AFFILIATION	ADDRESS	DATE OF RECOGNITION OR CERTIFICATION Jan. 1946 (Month, day, year)
9. Date of Expiration of Current Contract, if any Oct. 16, 1948 (Month, day, year)		

[fol. 112]

(Fill in Item 10 Only if You Have Checked Box 1E (UD) ABOVE)

10. Date of Election by Which Union Shop Authority Was Granted

(Month, day, year)

11. Parties or Organizations Which Have Claimed Recognition as Representatives (If none, so state)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM
------	-------------	---------	---------------

12. Other Unions Interested in the Employees Described in Item 5 Above (If none, so state)

NAME	AFFILIATION	ADDRESS
------	-------------	---------

13. Declaration

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner

Newspaper and Mail Deliverers Union of New York and Vicinity.

Affiliation, if any.....

By

/s/ Samuel Duker

(Signature of representative or person filing petition)

Attorney

(Title, if any)

Address

63 Park Row, N. Y. 7, N. Y.

(Street and number, city, zone, and State)

Re 2-9370

(Telephone number)

Willfully False Statement on This Petition Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 113] GENERAL COUNSEL'S EXHIBIT 9-B

(Copy)

United States of America
National Labor Relations Board

Withdrawal Request

(Number of case): 2-UA-4273.

(Name of case): In the matter of Gaynor News Co.

This is to request withdrawal of the (petition) [charge]*
in the above case without prejudice.

(Name of Party Filing): Newspaper and Mail Deliverers
Union of New York and Vicinity.

By (S.) Samuel Duker, Attorney.

Date 9/10/48.

Withdrawal request approved, 8/13/48.

(S.) Charles T. Douds, Regional Director, National Labor
Relations Board.

G-51.

[fol. 114] GENERAL COUNSEL'S EXHIBIT 2

Agreement made this 25th day of October, 1948, by and
between Gaynor News Company, Inc., hereinafter called the
"Employer" and Newspaper and Mail Deliverers' Union of
New York and Vicinity, hereinafter called the "Union", for
and in behalf of the Union.

Witnesseth:

That in consideration of the mutual promises exchange
herein, the parties hereto agree as follows:

Section 1

Subject to the provisions hereinafter set forth, the Em-
ployer recognizes the Union as the exclusive representative

* Struck out in copy.

for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay men and Canada men; present practice may be continued by the Employer as to operations in and jurisdiction over the return room. Employees may be required by the Employer either on different days or on any one day to perform any one or more of the operations covered in this paragraph, but no employee who is or has been performing satisfactorily the operation or operations assigned to him shall be discharged because of his inability to perform some other operation, and no employee shall be refused employment for the performance of any operation or combination of operations as to which there is a vacancy and for the doing of which he is qualified solely because he is not qualified to perform some other operation.

[fol. 115]

Section 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

2-c. The parties hereto agree that when a definition or interpretation of the thirty-day period has been handed down by law, then such definition or interpretation shall thereafter govern insofar as this contract is concerned.

• • • • •

Section 17

Mutual Guarantees

Because of the enactment of the Labor-Management Relations Act, 1947, this contract differs from its immediate predecessor and from contracts between these parties over a period of many years. Specifically, this agreement eliminates closed shop, and references thereto because it no longer is permissible under the federal law. This provision [fol. 116] is appended hereto as an appendix to, but not as a part of, this contract.

It is understood and agreed, however, for the duration of this contract, that if any provision as shown in the appendix hereto, and as modified from the preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof.

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is mutually agreed that the spirit as well as the letter of this agreement is to be observed in full and that neither party will enter into any other agreement which in any way renders impossible or inoperative any provision of this contract.

• • • • •

[fol. 117]

Schedule A

Gaynor News Company

	<i>Daily</i>	<i>Hourly Overtime</i>
Day Rates	\$16.19	\$3.0355
Night Rates	16.41	3.0768

Employees engaged in the performance of any of the operations set forth in Section 1 hereof receiving a wage above the present scale of wages at the signing of the Sept. 1943 contract, shall, so long as they continue employed at such operation by the employer, receive the increase provided for in this agreement, in addition to the wages they now receive; such excess compensation shall not be deemed to be attached to the several positions held by such employees but shall be deemed personal to them.

Any agreement which the Employer made at any time subsequent to September 9, 1943, for compensating any one or more employees engaged in the performance of any of the operations covered in Section 1 hereof at a rate in excess of the regular rate fixed herein, shall be subject at all times to the control of the Employer and may at any time, be modified or abrogated in whole or in part by the Employer.

[fol. 118]

Schedule B

More than 15 days but less than 25 days	1 day's vacation
More than 24 days but less than 41 days	2 day's vacation
More than 40 days but less than 57 days	3 day's vacation
More than 56 days but less than 73 days	4 day's vacation
More than 72 days but less than 89 days	5 day's vacation
More than 88 days but less than 105 days	6 day's vacation
More than 104 days but less than 121 days	7 day's vacation
More than 120 days but less than 137 days	8 day's vacation
More than 136 days but less than 153 days	9 day's vacation
More than 152 days but less than 169 days	10 day's vacation
More than 168 days but less than 185 days	11 day's vacation
More than 184 days but less than 201 days	12 day's vacation
More than 200 days but less than 217 days	13 day's vacation
More than 216 days but less than 233 days	14 day's vacation
More than 232 days	15 day's vacation

RESPONDENT'S EXHIBIT 2

Supplementary Agreement

The Gaynor News Company, Inc. and the Newspaper and Mail Deliverers' Union of New York and Vicinity herewith extend for the period of one year to and including October 18, 1948 the contract existing between them with only such changes as are hereinafter specified.

1. That beginning with the day shift of June 26, 1946, the wage rates shown in paragraph 7 shall be increased by \$1.00 per shift.

2. Paragraph 19 shall be amended to incorporate the following as 19(c):

[fol. 119] "19 (c) If either party desires to negotiate for a revision of the basic wage rates as shown in paragraph 7, herein amended, the parties shall enter into such negotiations thirty days prior to October 16, 1947 upon written notice by either party to the other.

"If such negotiations do not produce a mutually satisfactory agreement by September 30, 1947, then the matter shall be submitted to arbitration before a 5-Man Board consisting of two representatives of the Union, two representatives of the Employer and a fifth man, who shall be Chairman of the Arbitration Board and who shall be selected.

(1) by mutual agreement of the parties within 24 hours following September 30, 1947, or failing such an agreement,

(2) who shall be appointed by the Director of the United States Conciliation Service upon application by either or both parties on October 2, 1947.

Request shall be made of the Board of Arbitration that the matter be heard and determined before midnight on Oct. 16, 1947, so that any revision of the wage scale may become effective with the day shift of October 17, 1947. A decision of a majority of the Board shall be final and binding on all parties.

"It is mutually understood that if the parties agree among themselves, prior to October 17, 1947, on any

[fol. 120] revision of the wage scale then that such revision shall go into effect for the contract year beginning with the day shift of October 17, 1947, and ending October 16, 1948.

3. The parties hereto shall immediately after the signing and executing of this supplementary agreement undertake a study of the provisions of paragraph 14 (b) and 14 (f) of the contract to the end that:

(a) the filling of a vacancy brought about by a regular situation becoming vacant or a new regular situation being created shall affect no more than two members of the Union and shall not create a general round of applications for a series of vacancies brought about by an original vacancy; and

(b) that there be an equitable modification of the present provision of paragraph 14 (f) which permits an employee to retain a regular situation by working on it only one day in any 31 day period.

Should the parties fail to agree upon the modification of paragraph 14 (b) and 14 (f) as indicated herein within the period of ninety days after this agreement shall have been signed, then this matter shall be referred within ten days thereafter to a Board of Arbitration consisting of two representatives of the Employer, two representatives of the Union and the Impartial Chairman serving under paragraph 18 of the contract herein amended, who shall serve as Chairman of the Board.

A decision of the majority of this Board of the provisions of paragraph 14 (b) and 14 (f) shall be final and binding on [fol. 121] both parties and such decision shall be incorporated in the contract between the parties.

Signed this 22nd day of August 1946.

Gaynor News Company, Inc., By James B. Gaynor—
President. Newspaper & Mail Deliverers' Union
of New York and Vicinity, Joseph Simons, President,
William J. Burke, Secty. & Treas.

RESPONDENT'S EXHIBIT 1

9:15. Received Jun. 6, 1949, Second Region, New York, N. Y., NLRB.

Memorandum of agreement made this 2nd day of January 1946 by and between Gaynor News Company, Inc., hereinafter referred to as the "Employer" and Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter referred to as the "Union", for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the Employer and collectively designated as the "Employee", [fol. 122] In consideration of the sum of (\$1.00) dollar each to the other in hand paid, receipt of which is hereby mutually acknowledged, and in consideration of the mutual promises and covenants hereinafter set forth, the said parties hereto agree to and with each other as follows:

1. The Employer hereby agrees to employ only members of the Union to do and to perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, routemen, tiers, floor men, wrapper writers, relay men, and Canada men; present practice may be continued by the Employer as to operations in and jurisdiction over the return room. Members of the Union may be required by the Employer either on different days or on any one day to perform any one or more of the operations covered in this paragraph but no member of the Union who is or has been performing satisfactorily the operation or operations assigned to him shall be discharged because of his inability to perform some other operation; and no member of the Union shall be refused employment for the performance of any operation or combination of operations as to which there is a vacancy and for the doing of which he is qualified solely because he is not qualified to perform some other operation.

2. The Union shall furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the

Employer requires his regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift. When the Union fails to [fol. 123] furnish such men promptly, the Employer is authorized to meet his needs by employing such men as he may be able to obtain; if the men so employed are not members of the Union they shall be employed only so long as the Union does not furnish members of the Union willing and qualified to take their places, but any man so employed shall be allowed to complete his day's work. Nothing herein contained is to be construed as conferring of power upon any Employer to fill a regular situation with anyone not a member of the Union.

* * * * *

7. Wage rates for the performance of the several operations set forth in paragraph "1" hereof shall be as herein provided, retrospectively to and from July 1, 1945.

	<i>Daily</i>	<i>Overtime</i>
Day rates	\$10.46	\$1.96 per hr.
Night rates	11.13	2.086 per hr.

8. (a) All overtime shall be compensated at a rate of one and a half times the regular hourly rate and shall be computed in fifteen minute periods.

(b) Overtime before and after a day or night shift shall be worked as required by the Employer. Any charge that overtime is being required or distributed unfairly may be taken to the Adjustment Board for settlement.

(c) An Employee required to finish his job at a point sufficiently far from where it began to involve substantial travel time shall be compensated therefor. The parties shall negotiate such an arrangement and if they are unable to agree within thirty days after the effective date of this agreement the matter shall be submitted to the Adjustment Board.

[fol. 124] (d) Employees who, during the preceding calendar year, worked more than 52 days but less than 78 days, shall receive 2 days' vacation.

Employees who, during the preceding calendar year, worked more than 129 days but less than 182 days shall receive 6 days' vacation.

Employees who, during the preceding calendar year worked, more than 181 days but less than 234 days, shall receive 8 days' vacation.

Employees who, during the preceding calendar year worked more than 233 days shall receive two weeks' vacation.

Such vacation credit shall be earned when an employee is working on a situation as a regular or extra or substitute employee. The spirit and purpose of this provision is to disallow the duplication of vacation credits on the same situation. Days during sick leave shall be included in the schedule of days worked for which vacations are allowed. Holidays shall be included in the days for which vacations are allowed. The vacation schedule shall be arranged at the convenience of the employer, but on the basis of seniority. The days of the vacation period shall be consecutive. The Union shall supply union men to the Employers to cover the periods for which vacations are allowed, who may be employed at straight time rates. Employees thus receiving vacations will not be allowed to work during the vacation period. An employee who works during vacation period shall not be entitled to vacation pay. * * *

* * * * *

[fol. 125] 19. (a) This agreement shall be deemed effective from October 1, 1945 on receipt by the Employer of written notice from the Union that the agreement has been approved by the Executive Council and the members of the Union and shall continue in effect until and including October 16, 1947. The wages fixed in any renewal of this agreement shall be retroactive for the period from July 17, 1947 to October 16, 1947.

(b) On July 17, 1947 the parties to this contract shall in good faith begin to negotiate a contract for the period beginning October 17, 1947, and shall continue such negotiations until August 17, 1947. Such points as remain unsettled on August 17, 1947, shall come before a mediator to be designated by the New York State Board of Mediation and the parties shall continue to negotiate with the assistance of such mediator until September 17, 1947. Such points as remain unsettled on September 17, 1947, shall come before a Conciliator to be appointed by the Director

of the United States Conciliation Service and the parties shall work with such Conciliator until the matter is settled, but this provision shall not require either party to continue negotiations before such Conciliator beyond October 16, 1947, the expiration date. The parties may by mutual consent call upon the New York State Board of Mediation and the United States Conciliation Service jointly on August 17, 1947, or any time thereafter instead of proceeding separately with the two services as described in the foregoing sentences. The parties may by mutual consent discontinue negotiations before the New York State Board of Mediation prior to September 16, 1947, and call in the United States Conciliation Service at that time instead of [fol. 126] waiting until September 17, 1947. The parties may by mutual consent continue with the Mediator appointed by the New York State Board of Mediation after September 16, 1947, instead of calling in the United States Conciliation Service on September 17, 1947.

20. The signing of this agreement with the wage rates herein specified shall not be construed as establishing a pattern for wage differentials.

21. It is understood and agreed that the Union representatives are signing this agreement subject to the approval of the Executive Council and the members of the Union.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Gaynor News Company, Inc., James B. Gaynor,
President; Newspaper & Mail Deliverers' Union
of New York & Vicinity, Joseph Simons, President;
Daniel Ronan, William J. Burke, Charles J. Pel-
legrino.

[fol. 127] BEFORE THE NATIONAL LABOR RELATIONS BOARD,
SECOND REGION

[Title omitted]

STIPULATION--November 29, 1950

It is hereby stipulated and agreed by and among Bandler, Haas & Kass, Counsel for Respondent, and Samuel Duker, Counsel for the Party to the Contract, and Merton C. Bernstein and Jerome A. Reiner, Counsel for the General Counsel of the National Labor Relations Board, as follows:

1. Annexed and attached hereto and made a part hereof as if herein set forth in full is a copy of the supplementary agreement entered into by and between Gaynor News Company, Inc. and Newspaper & Mail Deliverers' Union of New York & Vicinity on the 9th day of October, 1947, amending the 1946 collective bargaining agreement, then in effect [fol. 128] between Gaynor News Company, Inc. and Newspaper & Mail Deliverers' Union of New York & Vicinity.

2. That the said supplementary agreement, Respondent's Exhibit A, be and is hereby made a part of the Record in the proceedings in the above entitled matter.

Dated: New York, November 29, 1950.

(S.) Merton C. Bernstein, Jerome A. Reiner, Counsel for the General Counsel, National Labor Relations Board, Second Region.

(S.) Bandler, Haas & Kass, Attorneys for Gaynor News Company, Inc. (S.) Samuel Duker, Attorney for Newspaper & Mail Deliverers' Union of New York and Vicinity.

SUPPLEMENTARY AGREEMENT—October 9, 1947

The contract between Gaynor News Company, Inc. and the Newspaper and Mail Deliverers' Union of New York and Vicinity, dated January 2, 1946, as supplemented by a

supplementary agreement between the parties dated August 22nd, 1946, is hereby further supplemented as follows:

1—Effective with the day shift of October 17th, 1947, and ending October 16th, 1948, the wage rates shown in paragraph 7 shall be increased by \$2.15 per shift.

[fols. 129-130] 2—Paragraph 19 (b) is hereby amended to read "1948" wherever therein the year "1947" appears.

3—In the event that the parties enter into a new written contract effective from the expiration of the existing contract which new contract shall expire no earlier than three months after the effective term of any new written contract which the Union may enter into with the Publishers' Association of New York City, then and in such event, the wage rates provided in such new contract between the parties hereto shall be applicable retroactively for the last three months of the present existing contract between the parties hereto in lieu and instead of the wage rates provided in the present existing contract between the parties hereto for the said three months period.

This agreement has been duly ratified by the Union Executive Council and by the Union General Body.

Dated, New York, October 9th, 1947.

Gaynor News Company, Inc. by (S.) James B. Gaynor, Pres. Newspaper and Mail Deliverers' Union of New York and Vicinity, by (S.) Joseph E. Curtis, Pres., Daniel F. Roman, William J. Burke, Charles J. Pellegrino, Leon Braunstein.

[fol. 131] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

Appendix to Brief for Respondent

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER BY THE
NATIONAL LABOR RELATIONS BOARD—February 25, 1952

To the Honorable, the Justices of the United States Court
of Appeals for the Second Circuit:

Gaynor News Company, Inc., respectfully answers the
petition for enforcement submitted in the above matter by
the National Labor Relations Board on the 20th day of
February, 1952.

The respondent respectfully admits all of the allegations
of the petition except that it denies that it committed any
unfair labor practice as stated in the petition, Paragraph
“1”, and in the order recited under Paragraph “2”, and,
therefore, states that this Court must deny enforcement of
said order and further respectfully shows:

1. That the National Labor Relations Board was at all
times relevant to the proceedings hereto and still is without
jurisdiction to have issued the complaint by virtue of the
fact that alleged violation did not occur in order to encour-
age membership in the union, and was, therefore, not
activity in violation of the Act.

[fol. 132] Wherefore, the respondent prays this Honor-
able Court that they cause notice of the filing of this answer
and a copy thereof to be served upon the petitioner and that
it deny enforcement of the order set forth in Paragraph “2”
of the petition in its entirety and for such other and further
relief as to the Court may seem just and equitable in the
premises.

Dated: New York, N. Y., February 25, 1952.

Gaynor News Company, Inc., by Bandler, Haas &
Kass; Julius Kass, a Partner, Bandler, Haas &
Kass, Attorneys for Respondent.

[fol. 133] BEFORE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM TESTIMONY

JAMES B. GAYNOR resumed the stand and testified further as follows:

Direct examination (Continued)

• • • • •

Mr. Kass: The stipulation is very simple, that any contract that existed between the union—and now we are getting into the issue in this case, Mr. Examiner, for the first time after a day and a half—that any contract between Gaynor News Company and Newspaper and Mail Deliverers' Union, was a contract whose benefits applied exclusively to members of the union; that by virtue of our obligations under the contract we made payment to the union members as required by that contract; that we made no payment to Sheldon Loner of vacation benefits which were paid to union members.

• • • • •

Mr. Kass: Mr. Examiner, so that we can save time, to explain the situation, the contract prior to General Counsel's Exhibit 2 provided for two weeks vacation. By virtue of the contract identified as General Counsel's Exhibit 2 a three-week vacation was provided for. Because of the fact that it had been established as general practice in other branches of the industry, and despite the fact that under the contract we were not obligated to give our employees a third week of retroactive vacation, in the interests of good labor relations and to maintain peace with the union, and not to have a different standard apply throughout the industry, we voluntarily granted those of our employees who were with us a third week's vacation.

• • • • •

[fol. 134] LEON BRAUNSTEIN was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

Direct examination.

* * * * *

Q. In your capacity of business agent of the union, did you know Sheldon Loner?

A. Yes.

Q. Can you tell us whether Mr. Loner at any time attempted to become a member of the Newspaper and Mail Deliverers' Union?

Mr. Bernstein: Objection. I fail to see the relevancy. The question as put is indefinite as to time and place. Unless put in some setting, it certainly has no relevancy. However, if at any time Mr. Loner made application for the union it would have no significance whatsoever.

Trial Examiner Asher: What is the materiality?

Mr. Kass: The materiality of the thing is that we will attempt to prove that we could not encourage Mr. Loner to become a member of this union because he had made every effort on his own behalf to become a member of this union.

* * * * *

Trial Examiner Asher: Let me ask Mr. Kass some questions. Assuming for the purpose of argument that Mr. Loner had attempted to become a member of the union, and had been unsuccessful in doing so, what is your theory as to how that would affect the question of whether or not the respondent is guilty of unfair labor practices?

Mr. Kass: I can state that very simply. I know as a matter of fact that Mr. Loner had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member [fol. 135] of this union because of the restrictions of the union upon its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encour-

age him to membership because he was already trying to become a member of that union. And that is our case.

• • • • •

Trial Examiner Asher: You have an automatic exception. If you care to, you can make an offer of proof on the record.

Mr. Kass: Through the witness, Leon Braunstein, we hereby offer to prove that Mr. Loner, the complaining witness in this case, attempted to be a member of this union. He filed his application for membership, that is his application for membership is still pending in the union and that the application for membership was filed long before October 25, 1948.

• • • • •

SHELDON LONER was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

• • • • •

Direct examination:

• • • • •

Q. Did you ever file an application for membership in the Newspaper and Mail Deliverers' Union of New York and Vicinity?

Mr. Bernstein: Objection on the same ground as the question put to Mr. Braunstein.

[fol. 136] Trial Examiner Asher: Is the purpose of this question the same?

Mr. Kass: The purpose of this question is to develop testimony on the question of whether we encouraged Mr. Sheldon A. Loner to become a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity and also to test the credibility with reference to the charges filed against the Gaynor News Company.

Mr. Bernstein: As to the issue of encouragement, I have already made my statement on the record. As to the issue of the witness' credibility, he has as yet not testified to any

material matter and his credibility is not at this point, at any rate, in issue.

Mr. Kass: He is a hostile witness, sir, and I draw your attention to the fact that this case was initiated by charges filed by this witness.

Trial Examiner Asher: That's correct, and under Rule 4B, you have the right, if you request it, to consider him a hostile witness.

Mr. Kass: I so request it.

.

Mr. Kass: The counsel for the General Counsel came in here and asked as part of his case that you take judicial notice of other petitions and a lot of other records around this Region of the National Labor Relations Board and I am trying to find out the history of the preparation of these charges. I am trying to find out why the charges weren't brought against the union at the same time they were brought against us. I question the bona fides of these charges. I question the good intentions of the Board in the preparation of the charges. I am trying to probe into them.

.

[fol. 137] Q. Did you make a demand upon Gaynor News Company for payment of retroactive pay?

.

A. Well, it seems natural that I did make a demand. I asked them for it—not exactly.

Q. Who did you ask for the money?

A. The party?

Q. Yes.

A. I spoke to Mr. Murray Levine.

.

Q. Who is Mr. Murray Levine?

A. He is the foreman.

Q. When did you speak to him?

A. I'd say it was within a couple of days after the retroactive pay was given.

Q. Well, what date was that?

A. Sometime in the middle of November, 1948.

Q. So that sometime in the middle of November, a few days after the retroactive pay was paid you asked Murray Levine for your money; is that correct?

A. No.

Q. What did you do?

A. I asked Murray Levine, "Do I get retroactive pay?"

Q. What did he say to you?

A. He said I was not entitled to it since I wasn't a member of the union.

Q. You weren't a member of the union, were you?

A. No.

Q. Had you applied for membership in the union?

Mr. Bernstein: Objection.

Mr. Kass: The witness opened the door himself. He said he was not a member of the union.

Mr. Bernstein: That has nothing to do with whether he applied or not. One fact appears on the record and is an operative fact.

Trial Examiner Asher: I will rule that whether or not he applied for membership in the union is immaterial. The objection is sustained.

Q. You knew that Gaynor was under contract with the Newspaper Deliverers' Union; is that correct?

[fol. 138] Mr. Bernstein: Objection. What the witness knew as to the contract is irrelevant to this proceeding.

Trial Examiner Asher: Oh, I will allow it in.

Mr. Bernstein: On what ground?

Trial Examiner Asher: Background.

Mr. Kass: Don't you think it is also pertinent as an essential fact in the case in addition to background?

Trial Examiner Asher: I will let it in for whatever it is worth. When I write my intermediate report I will place such weight on it as I believe should be placed on it.

Mr. Kass: That is better.

Would you repeat the question, Mr. Reporter?

(Question read.)

A. Yes.

Q. And you knew that that contract provided for employment of members of the union only, is that correct?

Mr. Bernstein: Objection. The contract speaks for itself. It is the best evidence of what is required.

Trial Examiner Asher: I think the question was his understanding of what the contract provided.

* * * * *

Q. Is your father a member of the Newspaper Mail Deliverers' Union?

Mr. Bernstein: Objection.

Trial Examiner Asher: What is the materiality of that?

Mr. Kass: The materiality is on the question of encouragement.

Trial Examiner Asher: I will sustain the objection.

* * * * *

[fol. 139] A. I knew there was a contract. Just what do you mean by "employer relationship"?

Q. Did you know that there was a contract between the union and Gaynor News Company which covered wages, hours, working conditions?

A. I was aware.

Q. You were aware. You had gotten your job at the Gaynor News Company through the business agent of the union, had you not?

Mr. Bernstein: Objection. How he got his job is immaterial at this point.

Trial Examiner Asher: What is the materiality?

Mr. Kass: The materiality is to show the question of encouragement of membership in the union.

* * * * *

Q. How did you get your job with the Gaynor News Company?

Mr. Bernstein: Objection. How he got his job with the company has no relevancy to the issues here.

Trial Examiner Asher: Same ruling.

Q. Did you ask Mr. Braunstein to get you a job with the Gaynor News Company—

* * * * *

JAMES B. GAYNOR recalled on behalf of the Respondent:

Trial Examiner Asher: I will remind you, Mr. Gaynor, you are still under oath.

Direct examination.

By Mr. Kass:

Q. I show you a copy of contract dated 2nd day of January, 1946 between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity and [fol. 140] ask whether this is a true copy of the collective bargaining agreement negotiated between your company and the union?

A. This is a true copy.

* * * * *

Q. Mr. Gaynor, I show you supplementary agreement between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity, dated October 18, 1948, and ask whether that is a true copy of the agreement executed by Gaynor News Company and the union?

Trial Examiner Asher: Suppose we mark that Respondent's Exhibit 2 for identification?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

A. It is.

* * * * *

Q. Do you have personal knowledge, Mr. Gaynor, as to the payments made to your employees by virtue of contracts?

A. I do.

Mr. Bernstein: May I ask that the Trial Examiner direct the witness to give Counsel for General Counsel the opportunity to make his objections heard? The witness is answering so quickly that I haven't got the opportunity.

The Witness: If you are slow, what do you want me to do?

Trial Examiner Asher: Just a minute. Let us not have any argument here. Give counsel a reasonable chance.

However, if that does happen no great harm is done because you can always move to strike the answer.

Proceed.

[fol. 141] Q. I am making reference to retroactive wage payments made to union employees for the period covering July 17, 1948 to October 24, 1948. Were those payments made to the members of the union in your employ at your direction?

A. They were.

* * * * *

Q. Were the orders for the non-payment of retroactive pay to non-union members issued at your direction?

A. They were.

Q. Can you tell us why you made payment of retroactive pay to the union members?

* * * * *

A. Yes, because it was called for by contract.

Mr. Bernstein: I move to strike as giving a legal conclusion.

Trial Examiner Asher: Do you wish to reply to that?

Mr. Kass: No, go ahead, you rule on it. I have asked a question.

Mr. Bernstein: What was or was not required by any of the contracts that are in evidence is attested to by those contracts.

Trial Examiner Asher: I will deny the motion to strike but I want to ask the witness a question to clarify that. When you say it was called for by the contract, to what contract are you referring?

The Witness: The contract is here dated with a supplemental agreement, original contract dated 2nd day of January 1946 and the supplemental.

* * * * *

Q. Mr. Gaynor, were you the official of the Gaynor News Company who issued the orders that after the effective date of the present contract, the one dated October 24, 1948 and identified in the proceedings as General Counsel Exhibit

No. 2, are you the official of the company who issued orders [fol. 142] not to give increased vacation benefits to non-union employees?

A. Would you read that question back?

(Question read.)

A. Yes, I am.

Q. Why did you issue the order that non-union employees were not to receive the increased vacation benefits?

A. Because I felt——

Mr. Bernstein: May I have a standing line of objections to these questions which call for the operation of the witness' mind?

Trial Examiner Asher: The record will so indicate.

A. (Continuing:) Because I felt I was bound only *my* contract to pay the union men those increased benefits.

.

Q. Mr. Gaynor, would you give me the history of the collective bargaining relationship between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity?

Trial Examiner Asher: From how far back?

Q. From its inception.

Mr. Bernstein: It seems rather broad, Mr. Examiner.

Trial Examiner Asher: May I ask the witness first when the inception was?

The Witness: The inception was in 1943.

Trial Examiner Asher: There was another question also pending.

Q. Will you answer my question, please? Give us the history of the collective bargaining relationship.

A. Well, at the beginning the drivers, or rather the em-[fol. 143] ployees that I then had were taken into the union and were given union cards before any collective bargaining agreement was arrived at with the Gaynor News Company. In May of that year, if my memory serves me right,

the drivers staged a sit-down strike in order to force the union to negotiate a contract with me. That time—

Mr. Bernstein: Excuse me, will the Reporter read that back, please?

Mr. Kass: I think the witness ought to be permitted to testify without interruption.

* * * * *

A. (Continuing:) —at the time I believe the War Labor Board was in existence and I believe it was through their offices that the men went back to work. After a long and tedious negotiation, the first contract was arrived at and, may I add, with a great many hardships.

The next contract—I believe that was a two-year contract.

Mr. Bernstein: Which date was that?

The Witness: I believe that would have been effected in October of 1943, approximately that date, I am not quite sure of the date. The next contract was negotiated two years later. At that time there was a joint negotiation, all the members in the Suburban Area negotiated together with this union for the purpose of saving time in negotiations. That was also a long and tedious negotiations and ran—

Trial Examiner Asher: What are we up to now, 1945?

The Witness: '45, yes. If I am not mistaken, it ran beyond the expiration date of the contract, the negotiation itself.

Q. And that resulted in the agreement identified as Respondent's Exhibit No. 1, is that correct, January 2, 1946?

A. That is correct.

* * * * *

[fol. 144] JAMES B. GAYNOR resumed the stand, and further testified as follows:

By Mr. Kass:

Q. Mr. Gaynor, when you were testifying yesterday, you were giving us the history of the collective bargaining

relationship between Gaynor News Company and the Newspaper and Mail Deliverers Union, and you had reached the point in your relationship where you had made reference to the negotiations which resulted in the contract of January 2, 1946. Would you please continue from that point?

A. Well, as I have previously stated, the negotiations were long and tedious, and during the negotiations we were harassed by threats of work stoppage, and it took a great deal of time, long hours, meetings into the night, to conclude that agreement. It was anything but a harmonious negotiation, both sides trying to get the best of the deal, and we were presented with a great many impossible demands. And we finally arrived at a contract.

Q. And the contract that you now refer to is the contract dated October 24, 1948, is that correct?

A. That is correct.

Q. You are charged with a violation by the General Counsel of Section 8 (a) (1) of the Act, and that section reads as follows:

“It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;”

I want to read Section 7 of the Act to you, and then direct a question to you with reference to it, and I would appreciate if you would pay close attention while I read Section 7 to you.

It reads:

“Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).”

Now, I ask you, did you at any time interfere with the right of any of your employees to “form, join or assist

labor organizations, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”?

Mr. Bernstein: Objection. I object to the form of the question. It is leading. I object to the question on the ground that it calls for a conclusion of law. I further object on the ground that it calls for the operation of the witness' mind.

I further object to the question on the ground that it calls for testimony which is immaterial and irrelevant to the charges and issues in this case.

Trial Examiner Asher: Let me ask the witness: Do you understand what the words mean which were read to you by your counsel?

The Witness: Yes, I believe I do.

Trial Examiner Asher: I will overrule the objection, and allow the witness to answer.

By Mr. Kass:

Q. Will you answer yes or no to the question, sir?

A. I did not in any way interfere.

Q. You are also charged with a violation of Section 8 (a) 2, and that section reads as follows:

“It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration [fol. 146] of any labor organization or contribute any financial or other support to it.”

I ask you, did you, at any time, dominate or interfere with the formation or administration of the Newspaper and Mail Deliverers Union of New York and Vicinity?

Mr. Bernstein: Same objection, Mr. Examiner. I wish to point out that these questions are highly leading, and in addition to that, I wish to emphasize that they call for conclusions of law.

Trial Examiner Asher: I don't consider them so highly leading.

Let me ask the witness again: Do you understand the meaning of the words read to you by your counsel?

The Witness: Yes, I do.

Trial Examiner Asher: I will overrule the objection and allow the witness to answer.

.

A. I did not.

By Mr. Kass:

Q. You are also charged by the General Counsel with a violation of Section 8 (a) 3, and that section of the Statute says that:

"It shall be an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization."

Now, I ask you whether you did, at any time, by discrimination in regard to hire or tenure of employment or any term or condition of employment encourage or discourage membership in the Newspaper and Mail Deliverers Union of New York and Vicinity?

.

[fol. 147] Q. Will you tell us whether you, at any time, by discrimination in regard to hire or tenure of employment or any term or condition of employment did encourage or discourage membership in the Newspaper and Mail Deliverers Union of New York and Vicinity?

A. I did absolutely nothing to encourage or discourage membership in this union.

.

Cross-examination.

.

Q. And were there non-union employees from that time to the present always employed in the delivery department of Gaynor?

A. I believe that is correct.

Q. On January 1, 1946, Mr. Gaynor, were you aware of

the fact that the union had a policy of limiting its membership?

.

Mr. Bernstein: The relevancy of the question, Mr. Examiner, is as follows: You will note that the preamble to Respondent's Exhibit No. 1 indicates that the union is recognized for and on behalf of its members. Later on, it purports to be a closed shop contract.

.

Trial Examiner Asher: You are referring to Respondent's Exhibit 1?

Mr. Bernstein: I believe so, if that is the January 1946 contract. You will notice in the first sentence what the recognition clause is.

I wish to point out and I wish to prove through this witness that at all times the respondent knew and had reason to know that non-union employees would be continually in the employ of its delivery department. I wish to show what the practice was and what the expectations of the respondent were.

[fol. 148] Mr. Kass: Mr. Examiner, may I invite your attention to the fact that there are no allegations in the complaint challenging the validity of the contract dated July 2, 1946? This complaint questions the legality of the current contract, the one executed October 25, 1948. There are no allegations whatsoever with reference to the old contract.

We attempted to show you yesterday, and there was strenuous objection by counsel for the General Counsel to the open and honest admission of testimony when the complaining witness, Sheldon Loner, was on the stand, and I hope that you recall that I asked him whether he was a member of the union, whether he had tried to become a member of the union, and I wanted to introduce testimony which brought into the open the entire question of what this complaining witness wanted to do with reference to the union.

Counsel for General Counsel, for reasons best known to himself, wanted to hide the full facts from the examiner,

and evidently from the courts. What could be gained by that concealment is beyond my comprehension. But, anyway, he made the concealment, and he wanted to hide the facts.

We wanted to tell you yesterday that by virtue of that agreement of January 2, 1946, we had a contract where we were bound to employ exclusively members of the union, and we wanted to tell you that by virtue of that contract, when Sheldon Loner took a job there, when he got that job through the aid and assistance of the business agent of the union, Leon Bronstein, who, again, the counsel for the General Counsel did not permit to testify, to give you the entire facts—this boy knew that he could be bumped out of his job when a union man applied for the job. That was the contract [fol. 149] tract and that was the law, under the old Wagner Act. The Colgate-Palmolive-Peet case, which I cited to you yesterday, decided by the United States Supreme Court on December 5, 1949, in a strong opinion by Judge Minton, upheld the validity of that contract and ruled that the policy of the Board, where they attempted to attack that type of contract and discharges under that type of contract, was censorable.

.

By Mr. Bernstein:

Q. But you knew, in fact, Mr. Gaynor, didn't you, that on January 1, 1946, it was almost impossible to gain admission to this union unless you were the son of a member of that union? Weren't you aware of that fact at that time?

.

SHELDON LONER, recalled.

.

By Mr. Kass:

Q. Mr. Loner, did you obtain your job with the Gaynor News Company through Leon Bronstein, business agent of the Newspaper and Mail Deliverers Union of New York and Vicinity?

.

By Mr. Kass:

Q. Mr. Loner, did you at any time prior to your employment with Gaynor News file an application for membership in the Newspaper and Mail Deliverers Union?

[fol. 150] Mr. Kass: Yes, sir. Section 12 of the complaint charges us with encouraging membership in the union, and I desire to prove, through -his witness, of his own volition, this witness had applied for membership in the union; that his job with Gaynor News Company was obtained through union intercession, and that he, at the present time, has an application for membership in the Newspaper and Mail Deliverers Union, and therefore it supports our defense that we could not encourage this charging witness with membership in the union, since he was doing everything humanly possible under the sun, within his power, to become a member of that union.

Trial Examiner Asher: Do you consider that as an offer of proof?

Mr. Kass: Yes, sir.

Trial Examiner Asher: The offer of proof is rejected, and the objection is sustained.

By Mr. Kass:

Q. Were you encouraged to become a member of the Newspaper and Mail Deliverers Union of New York and Vicinity as a result of your not receiving retroactive pay and vacation pay?

Mr. Bernstein: Objection. The actual effect of the company's action upon the charging party, or others, is not material.

Trial Examiner Asher: Do you want to reply to that before I rule?

Mr. Kass: Yes, sir. That is the charge, the charge made against us in accordance with the statute, "thereby encouraging membership in the union."

[fols. 151-152] Trial Examiner Asher: I believe that was my ruling the first day of the hearing, Mr. Kass, as to the intervention and certain limitations.

I will rule on this question that whether or not Mr. Loner actually felt that effect is immaterial, and the objection is sustained.

By Mr. Kass:

Q. Was there anything that the Gaynor News Company did, during your employment with the Gaynor News Company, that strengthened your desire to become a member of the Newspaper and Mail Deliverers Union?

Mr. Bernstein: Same objection.

Trial Examiner: Same ruling.

By Mr. Kass:

Q. Was there anything that the Gaynor News Company did that encouraged you to seek membership in the Newspaper and Mail Deliverers Union?

• • • • •

[fol. 153] IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 231

Argued May 13, 1952 Docket No. 22297

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GAYNOR NEWS COMPANY, INC., Respondent

OPINION—June 24, 1952

Before Augustus N. Hand, Chase and Frank, Circuit Judges

Petition for enforcement of an order of the National Labor
Relations Board. Modified and Enforced as Modified

George J. Bott, David P. Findling, A. Norman Somers, Frederick U. Reel and Louis Schwartz, for petitioner; Bandler, Haas & Kass, for respondent; Vladeck & Elias (Stephen C. Vladeck and Milton Horowitz, of counsel), for Newspaper and Mail Deliverers' Union of New York.

[fol. 154] The facts are stated in the opinion of the Board, reported in 93 N. L. R. B. 299.

FRANK, *Circuit Judge*:

The Board has found the employer-respondent guilty of violating Sections 8 (a) (1) (2) and (3) by (1) retroactively paying wage increases and vacation benefits to union members only, and (2) agreeing to and enforcing an illegal union shop contract in 1948 without first obtaining Board certification that a majority of employees had authorized such an agreement in a union shop election. The employer admits substantially all the facts of both violations, but, on several grounds, defends its actions and repudiates the consequences.

1. It says, first of all, that § 10(b) of the Act prohibits prosecution for refusing the retroactive benefits to anyone

but Loner, the employer who first filed charges. This original charge was later amended—more than six months after the violations charged—to include (a) a charge of the same discriminatory treatment of other non-union employees besides Loner, and (b) a charge that the 1948 contract was illegal and in violation of employees' rights under § 8(a) (1)(2)(3) of the Act. Section 10(b) of the Act reads:

“No complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.”

This section has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which “relate back” or “define more precisely” the charges enumerated within the original and timely charge. The “relating back” [fol. 155] doctrine for this purpose has been liberally construed to give the Board wide leeway for prosecuting offenses unearthed by its investigatory machinery, set in motion by the original charge. *N. L. R. B. v. Kobritz*, 193 F. (2d) 8, 14-16 (C. A. 1); *Cusano v. N. L. R. B.*, 190 F. (2d) 898, 903-904 (C. A. 3); *N. L. R. B. v. Kingston Coke Co.*, 191 F. (2d) 563, 567 (C. A. 3); *Kansas Milling Co. v. N. L. R. B.*, 185 F. (2d) 413, 415 (C. A. 10). Thus a general allegation in the original complaint that the employer had interfered with employees in the exercise of their § 7 rights by restraining and coercing them, discriminating in regard to hire and tenure and refusing to bargain in good faith, was subsequently—more than six months after the date of the alleged violation—amended to allege discharges of particular employees for legitimate union and strike activities. *Kansas Milling Co. v. N. L. R. B.*, 185 F. (2d) 413, 416 (C. A. 10).

We feel that the enlarged complaint can be justified here on the “relating back” theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition

certainly could not prejudice the employer's preparation of his case, or mislead him as to what exactly he was being charged with. Cf. *N. L. R. B. v. Reliable Newspaper Delivery, Inc.*, 187 F. (2d) 547, 550 n. 3 (C. A. 3); *Consolidated Edison v. N. L. R. B.*, 305 U. S. 197, 238. The same is true of the additional allegation in the final complaint that action previously categorized as a violation of §§ 8(a) (1) and (3) constituted also a violation of § 8(a)(2). This was only a change in legal theory and not in the nature of the offense charged. *Cusano v. N. L. R. B.*, 190 F. (2d) 898, 903 (C. A. 3). As to the charge of illegality concern- [fol. 156] ing the 1948 contract, we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of § 10(b) had not even begun to operate. See *Superior Engraving Co. v. N. L. R. B.*, 183 F. (2d) 783, 790 (C. A. 7); *Katz etc. v. N. L. R. B.* (April 21, 1952 (C. A. 9)). The complaint was, then, in all respects valid.

2. This brings us to the substance of the complaint. The employer admits giving union members retroactive wage increases and vacation benefits while denying them to non-union members. It claims, however, that such action had neither the purpose nor the effect required by § 8(a)(3), i.e., to encourage membership in any labor organization; that the Board failed to prove that purpose and effect, and that, therefore, the action cannot be sanctioned. Loner, the original complainant, it is argued, had already unsuccessfully done everything he could to enter this union; his membership application was pending at the time of the violation; nothing the employer could do would amount to further "encouragement" of that membership. The employer relies heavily on *N. L. R. B. v. Newspaper Delivery, Inc.*, *supra*. There an employer acceding to the requests of a minority union, bargaining on a members-only basis, gave union members discriminatory advantages over non-union members. The Court held that such discrimination could not have the necessary effect of encouraging union membership because the union was a closed one, with membership passing exclusively from father to son. There is, however, one significant distinction between that case

and this one. There discrimination resulted from what the court considered the entirely legal action of the minority union in asking special benefits for its members [fol. 157] only. The union made no pretense of representing the majority of employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the Court, were quite able to elect their own representative and ask for similar benefits. Not so here. The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation.

True, the Third Circuit in the *Reliable* case went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. Several cases, including one of our own, *N. L. R. B. v. Air Associates*, 121 F. (2d) 586, 592, were cited there to support this interpretation of § 8(a)(3). But see our explanation of that case in *N. L. R. B. v. Cities Service Oil Co.*, 129 F. (2d) 933, 937 (C. A. 2). The Board, on the other hand, here cites *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 800, for the proposition that no statistical proof of an actual "encouraging" effect on union membership need be shown where the discriminatory conduct by its nature "tends to encourage or discourage" union membership. See also *N. L. R. B. v. Engelhorn & Sons*, 134 F. (2d) 553, 557 (C. A. 3); *N. L. R. B. v. Illinois Tool Works*, 153 F. (2d) 811, 814 (C. A. 7); *N. L. R. B. v. Ford et al.*, 170 F. (2d) 735, 738 (C. A. 6).

Our own view comes to this: Discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it "encourages" union membership, by increasing the number of workers who would like to join and/or their quantum of desire. It may well be that the [fol. 158] union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these re-

jected applicants have been, and will continue to be, "encouraged," by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to "seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action." A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously "encouraged" by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator. To this extent, we find ourselves in disagreement with the *Reliable* case, and do not hesitate in holding the action here violative of both § (a)(1) (2) and (3).

The employer makes one additional—and feeble—argument, which we speedily reject, based upon the "closed-shop" proviso to the Wagner Act § 8(3), in effect at the time of these violations. That proviso allowed an employer to agree with a union "to require as a condition of employment membership therein." Since discriminatory hiring and firing were thus legal in a closed shop, says the employer, a lesser discrimination—i.e., in retroactive payment of wages, vacation benefits, etc.—was also legal. Reason as well as statutory text disagree. The proviso was a specific exception to what would otherwise have been a violation of the general anti-discrimination rule laid down in old § 8(3). [fol. 159] The purpose of the closed-shop proviso was to permit what was then thought to be a unifying influence in labor relations, i.e., one union representing and supported by all employees bargaining with one employer. No such rational justification for discrimination in working conditions exists; the effect of this kind of discrimination is indisputably discordant, divisive, and conducive to conflict and bad feeling in the plant. We think that Congress never meant, by implication or otherwise, to allow such a patently

unfair and labor-strife-provoking policy in industries under its control.

3. The last point of substance we must consider concerns the alleged violations of § 8(a)(1)(2)(3) stemming from the 1948 contract which contained a union security clause. At that time, no such clause could be executed unless the majority of employees in a Board-conducted union-shop election authorized it. Here, no such election was held. The contract did contain a "saving clause" reprinted in the margin¹—that, "should * * * any provision of this agreement be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted." The effect of such a clause, however, as the Board noted, was not to defer the application of the union-security provision but only to postpone "the issue of its legality for future determination by some proper tribunal." Very recently, in *N. L. R. B. v. Red Star Express Lines* (April 14, 1952), we held that a similar "saving clause"—if anything a more cautious one, providing that [fol. 160] provisions of questionable legality under the 1947 amendments to the Labor-Management Act should not go into effect until held legal—would not suffice to prevent the agreement from constituting an unfair labor practice. Our reason was that an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract

¹ "To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulations. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect."

against this illegality. The same principles serve to void the union-security provisions here.

As a result of finding the union-security provision illegal, the Board ordered the employer to cease and desist from enforcing this contract or any other with this or any other union, or from recognizing any union's representative status in any way until duly certified by the Board. By these injunctive provisions—§§ 1(b)(c)(d) and 2(b) of the Board's order—the employees lose all their rights under the 1948 contract—wages, hours, benefits, etc.—and are prevented from enforcing any new ones. The illegality in this contract lay solely in the union's failure to secure prior approval from a majority of employees for the union-security clause—a requirement since abolished by Congress in 1951 as burdensome and unnecessary. That approval can no longer be secured at this late date, nor is it necessary to any new contract.

The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will "be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract." The Board also says that the union's present position was illegally advanced by the employer's discriminatory treatment of non-union employees. See *Katz etc. v. [fol. 161] N. L. R. B. supra*. Nevertheless we believe the remedy works out too harshly here. The union has asked the Board for consideration of its petition for certification and has been refused, with the advice that no such action will be taken until the Board's order has been fully complied with. Compliance must come from the employer. Meanwhile this or any other union, and consequently all the employees, are in a box and cannot enforce any rights or demands through collective bargaining. The employer, the sole party against whom the Board proceeded, gains through this total lifting of any contractual restraints on its action. The union here involved claims it has entered into a new contract with the employer which, it says, abolished all taint of illegality contained in the earlier one. This the Board does not deny, nor do we pretend to pass on the question here. We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial

harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification. If, during this interval, the employer should do or agree to do anything that would illegally discriminate against any employees or in any other way violate the remaining portions of the Board's order, the Board is still free to prosecute the employer for contempt.

Modified. Enforced as modified.

[fol. 162] CHASE (concurring in part and dissenting in part):

I agree with my brothers that the unfair labor practices found were established by the evidence and differ with them only in that I would enforce the order as made by the Board. As was said in *I. A. of M. v. National Labor Relations Board*, 311 U. S. 72, 82, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453, 461." Indeed, it is not because the remedy itself is wrong but only because the Board has not acted upon the union's petition for certification, while the unfair labor practices of which the union is in part the beneficiary remain in effect, that my brothers are withholding full enforcement. That seems to be such an unjustifiable interference with the power of the Board to exercise its sound discretion that I cannot subscribe to it.

[fol. 163] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD—Filed July 8, 1952

Before Augustus N. Hand, Chase and Frank, Circuit Judges

This Cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated February 16, 1951. The Court heard argument of respective counsel on May 13, 1952, and has considered the briefs and the transcript of record filed in this cause. On June 24, 1952, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the aforesaid Order of the Board. In conformity therewith, it is hereby

Ordered, adjudged and decreed that the Respondent, Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended;

[fol. 164] (b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity;

(c) Entering into, renewing, or enforcing any agreement

with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Make whole Sheldon A. Loner and all other non-union employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated October 19, 1950, in the section entitled "The Remedy";

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Decree:

(c) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked "Appendix A". Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Second Region (New York, New York), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[fol. 165] (d) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

Augustus N. Hand, Judge, United States Court of Appeals for the Second Circuit; Jerome N. Frank, Judge, United States Court of Appeals for the Second Circuit.

[fol. 166]

APPENDIX A

Notice to All Employees

Pursuant to a Decree of the United States Court of Appeals
Enforcing, as Modified, An Order

of the National Labor Relations Board, and in order to
effectuate the policies of the National Labor Relations Act,
we hereby notify our employees that:

We will not encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discriminating in regard to their hire and tenure of employment, or any term or condition of employment of any of our employees because of their nonmembership in such organization.

We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for

any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer), by —
— (Representative), — (Title).

Dated — —, —.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[File endorsement omitted.]

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.

(4181)

[fol. 165] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1952

No. 371

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7100)

any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer), by —
— (Representative), — (Title).

Dated — —, —.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[File endorsement omitted.]

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.

(4181)

[fol. 165] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1952

No. 371

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7100)

No. ~~371~~ 7

Office - Supreme Court, U. S.

OCT 2 1952

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

Dated: September 23, 1952.

BLEED THROUGH- POOR COPY

TABLE OF CONTENTS.

	PAGE
Petition for Writ of Certiorari.....	1
Jurisdiction	1
Statement of the Case.....	2
Questions Presented	5
Reasons Relied on for Allowance of Writ.....	6
Brief in Support of Petition.....	9
Opinion Below	9
Jurisdiction	9
Statement of the Case.....	9
Specification of Errors.....	9
Statutes Involved	10
Summary of Argument.....	11
ARGUMENT:	
POINT I.—The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.....	12
(a) The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.....	12
(b) The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.....	18
POINT II.—The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges.....	28
Conclusion	30

TABLE OF CASES.

	PAGE
<i>Associated Press v. National Labor Relations Board</i> , 301 U. S. 103 (1937).....	14
<i>Consumers Power Co. v. NLRB</i> (CCA 6, 1940), 113 F. 2d 38.....	28
<i>National Labor Relations Board vs. International Brotherhood of Teamsters, Chauffeurs, Ware- housemen and Helpers of America etc. Local Union No. 41, A. F. of L.</i> , 196 F. 2d 1 (1952).....	8, 17
<i>National Labor Relations Board v. Reliable News- paper Delivery, Inc.</i> , 187 F. 2d 547 (1951).....	7, 12, 13, 15, 16, 17, 26, 29
<i>N. L. R. B. v. Air Associates</i> (C. C. A. 2, 1941), 120 Fed. 2d, 586.....	26
<i>N. L. R. B. v. Childs Co. et al.</i> (C. C. A. 2), 195 F. 2d 617 (1952)	20
<i>N. L. R. B. v. Del E. Webb Construction Co. et al.</i> (C. C. A. 8), 196 F. 2d 702 (1952).....	16
<i>N. L. R. B. v. Engelhorn & Sons</i> (C. C. A. 3, 1943), 134 Fed. 2d, 553, 557.....	26
<i>N. L. R. B. v. Link Belt Co.</i> , 311 U. S. 584 (1941).....	20
<i>N. L. R. B. vs. Public Service Transport</i> , 177 F. 2d 119 (1949)	27
<i>Perkins v. Endicott-Johnson Corporation</i> (C. C. A. 2, 1941), 128 Fed. 2d, 208.....	26, 27
<i>Quaker City Oil Refining Corporation v. NLRB</i> , 119 Fed. 2d, 631.....	27

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Your Petitioner, Gaynor News Company, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the Order entered by said court on July 8, 1952, in case No. 22297 on the docket of that court.

Jurisdiction.

Jurisdiction to issue the writ requested is provided for in Title 28, U. S. Code, Sec. 1254(1).

The particular facts in this case also place it within the purview of Supreme Court Rule 38, par. (5b), which recognizes the jurisdiction of this Court to accept cases in which a Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Statement of the Case.

There is little dispute as to the underlying facts in this matter. The main issues revolve about the proper statutory construction to be given Sec. 8(a)(3) of the Labor-Management Relations Act of 1947. The pertinent language in this section provides:

“Sec. 8(a). It shall be an unfair labor practice for an employer—

• • • • •

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:”

The clear intention of this provision, manifest by the language employed, is to prohibit encouragement or discouragement of union membership by discrimination in regard to conditions of employment.

Gaynor News Company, Inc. (hereinafter referred to as Petitioner), is engaged in the wholesale distribution and delivery of newspapers and periodicals. In 1946 it concluded a valid closed shop agreement with the Newspaper and Mail Deliverers' Union (hereinafter called “the Union”), restricting employment in Petitioner's business to members of the Union. However, employment of non-union employees was permitted pending such time as the Union could supply union members. This union was for all practical purposes a closed union and was not accepting new members except for “legitimate issue” of members. The non-union employees, whose rights and status are here involved, did not have tenure in that they could be validly discharged any time the Union supplied members to replace them. Obvi-

ously, they were not covered by the closed shop contract, since, as with every closed shop contract, it was applicable to union members only.

The specific charge in this matter was brought by a single non-union employee (hereinafter referred to as "Loner"), to the effect that Petitioner was guilty of encouraging Loner's membership in the Union by its failure to pay him a certain amount of retroactive pay received by Petitioner's permanent union personnel under its contract and a vacation benefit which Petitioner voluntarily granted its regular employees. (Voluntarily in the sense that it was not required by the collective bargaining agreement. Obviously, in granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmonious labor relations with its permanent personnel.) A complaint issued on the basis of the charge in February, 1949, and an "amended complaint" issued in June, 1950, which raised, for the first time, the question of the invalidity of the 1948 contract. A hearing was held before Trial Examiner Asche on July 17-19, 1950, and the Trial Examiner found that Petitioner had committed the unfair labor practices specified in the charge and recommended that an Order issue extending the benefits claimed not only to Loner, but to all non-union employees similarly situated. The National Labor Relations Board issued its Order as recommended and the matter was taken to the United States Court of Appeals for the Second Circuit on petition for enforcement. That court modified the Order of the National Labor Relations Board insofar as it forbade the Union to continue to enjoy representative status and conduct negotiations on behalf of its employee members. The remainder of the Order was directed to be enforced as made.

Neither the charge nor the complaint is supported by any evidence that Petitioner had the least interest or motive with respect to Loner's affiliation or non-affiliation with the Union. Petitioner offered to show that Loner had long since applied for membership, had been denied such membership, and was, in fact, ineligible for such membership,¹ and this testimony was barred. The Board and the United States Court of Appeals for the Second Circuit held that the purpose and effect of the Petitioner's actions were immaterial and that it was guilty of unfair labor practices, on the ground that the conduct here involved was "inherently" conducive or had a "natural tendency" toward increasing union membership.

The Petitioner's position is that since it was not contractually bound to pay extra benefits to its relatively temporary non-union employees, in its business judgment it did not do so. The factors influencing its choice clearly had no relation to any inclination on Petitioner's part to see Loner become a member of the Union, nor to the possibility that such membership would occur. On the contrary, under the peculiar circumstances, Petitioner would have been much more interested in keeping its temporary non-union personnel in *statu quo* since they would thereby continue to be contractually ineligible for extra benefits.

It is not questioned that the Union and Petitioner were at all times relevant to this proceeding at "arms length" in the most traditional employer-union sense. The bitterness of the protracted negotiations preceding both the 1946 and 1948 contracts was undisputed and not contro-

¹ (G. A.—4, 5, 6, 7, 19). Hereinafter Petitioner cites briefs and Appendices of the respective parties as B. B. and B. A. for Board's Brief and Board's Appendix, respectively (Petitioner below), and G. B. and G. A. for Petitioner's Brief and Appendix (Respondent below).

verted. Thus the contention of the Board that Petitioner is guilty of assisting and encouraging membership in a union to which it has been bitterly opposed is anomalous. The decisions of the Board and the United States Court of Appeals for the Second Circuit find the Petitioner guilty of encouraging membership in a union it strongly opposes and which clearly did not wish the membership allegedly sought to be encouraged.

Questions Presented.

1. Can an employer be held guilty of an unfair labor practice under Section 8(a)(3) of the Labor-Management Relations Act of 1947, which provides that he may not encourage or discourage membership in any labor organization by discrimination in regard to any terms or conditions of employment, where there is absolutely no evidence to indicate that the acts complained of encouraged or discouraged such membership, or that that was their purposes?

2. The Labor-Management Relations Act of 1947 provides in Section 10(b) that "• • • No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made • • •". It continues to state that the charge may be amended by the Board until such time as an order is issued. However, in view of the six months Statute of Limitations and the legislative history of this section of the Statute, can the Board still "amend" an original complaint, so as to add new charges long after the six months' period has expired?

Reasons Relied on for Allowance of Writ.

It is submitted that the Circuit Court of Appeals for the Second Circuit has determined an important question of statutory construction in a manner in conflict with decisions of other Circuit Courts of Appeals.

This decision holds an employer guilty of violating a statute which forbids it from encouraging Union membership, in spite of the fact that there is overwhelming evidence to the effect that, under the peculiar circumstance of this case, the employer could not possibly have further encouraged such membership; that it had no motive to desire such a result, but rather a far greater motive to prevent it; and finally, that the employer's conduct did not have the forbidden result.

The statute in its pertinent language provides:

"Section 8. It shall be an unfair labor practice for an employer * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership* in any labor organization." (Italics supplied.)

The clear language of the statute makes the particular offense *encouragement* or *discouragement* of membership in any labor organization. The interpretation of the Second Circuit places emphasis on the word "discrimination" alone rather than on " * * * discrimination * * * to encourage or discourage membership in any labor organization". Its decision holds that certain types of discrimination are "inherently conducive to increased Union membership", and that the mere act of discrimination alone is sufficient to render the employer guilty of violating this section of the

Act. It is, therefore, in conflict with the decisions of other Circuit Courts of Appeals on this same subject, which hold that the alleged discrimination must be made with the *intention* of encouraging or discouraging Union membership, and that it must have that result.

The Circuit Court of Appeals for the Third Circuit has held that an employer cannot be held guilty of an unfair labor practice under this Section of the Statute unless his acts had the *purpose* and *effect* of encouraging or discouraging Union membership. In that case, as in the one at hand, no act of the employer could have constituted a further inducement to Union membership, since the employees affected had already done everything in their power to obtain such membership and were held to be ineligible by the Union. That case involved the same contract and the same Union as is here involved. *National Labor Relations Board vs. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951).

The Circuit Court of Appeals for the Eighth Circuit followed that decision and went on to say:

“Nothing that respondent-company might do by way of discriminating against him [the employee] could be said proximately to encourage him to join a Union which was impossible for him to join. *There can be no violation of this Statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization.* *National Labor Relations Board vs. Del E. Webb Construction Company et al.*, 196 F. 2d 702, 706 (1952). (Italics supplied.)

In another case involving the construction of the same statute, that Court reaffirmed and followed the *Reliable* case, *supra*, and held discrimination as to any term or condi-

tion of employment was not sufficient of itself to be a breach of Section 8(a)(3), but it must have the purpose and effect of encouraging or discouraging membership in a Union. *National Labor Relations Board vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America etc. Local Union No. 41, A. F. of L.*, 196 F. 2d 1 (1952).

Thus we find that of the four cases directly in point, two decisions in the Eighth Circuit and one decision in the Third Circuit are all diametrically opposed to the holding in this case in the Second Circuit. In view of the divergent views held by the Circuit Courts of Appeals on the construction of this important Federal statute, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS, and
MAURICE H. GOETZ,
Of Counsel.

Dated: September 23, 1952.

Supreme Court of the United StatesOCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.****Opinion Below.**

The opinion of the United States Court of Appeals for the Second Circuit filed on July 8, 1952, is not yet officially reported. It is printed in full in the record (G. A., p. 22).

Jurisdiction.

As noted in the petition, jurisdiction is invoked under Title 28, U. S. Code, Sec. 1254 (1).

Statement of the Case.

The essential facts, concerning which there is no dispute, are fully set forth in the foregoing petition.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that an employer may be guilty of an unfair labor practice under Section 8(a)(3) of the Labor-

Management Relations Act of 1947, which forbids employers from encouraging or discouraging union membership, where there is no proof to substantiate the decision. The finding is based on the grounds that the employer's acts were "inherently conducive" toward encouraging union membership in spite of the fact that there is overwhelming evidence to the effect that the employer had no such purpose nor did his acts have such effect. The employees involved had made every possible effort to become union members prior to the alleged discrimination, however, under the constitution and by-laws of the Union these employees were ineligible for such membership and no act of the employer could have further increased their desire for membership or their opportunities for admittance. Furthermore, the entire history between this employer and the union has been one fraught with antagonism and bitter controversy and it is an established fact that the employer suffers financially whenever a new employee is admitted to the Union. In the light of that background it is anomalous to accuse this employer of encouraging membership in the Union.

2. In determining that the National Labor Relations Board may "amend" a complaint more than six months after a charge has been filed so as to change the complaint in both form and substance.

Statutes Involved.

The statutes involved are: (a) Sec. 8(a)(3) of the Labor-Management Relations Act of 1947 which states:

"it shall be an unfair labor practice for an employer
 * * * by discrimination in regard to hire or tenure
 of employment or any term or condition of employment, to encourage or discourage membership in any
 labor organization * * *."

(b) Sec. 10(b) of the Labor-Management Relations Act of 1947 which provides " * * * no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

SUMMARY OF ARGUMENT.

POINT I.

The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.

(a) The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

(b) The Board has failed to prove that petitioner encouraged union membership within the meaning of the Act.

POINT II.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges.

ARGUMENT.

POINT I.

The Board has failed to prove that petitioner violated Section 8(a) (3) of the Act.

(a) The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

In *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951) which involved the identical questions raised here, dealing with the identical collective bargaining contracts and with the identical situation with respect to non-union employees, the Third Circuit found no "discrimination" within the meaning of the Act. In addition, the Court found no "encouragement of union membership" as required by the Act; as that Court cogently stated:

" * * * The employer did not deprive its non-union workers of anything to which they were entitled. They had been given their full wages during the period which later became subject to Union retro-active pay. There was never any arrangement with them then or later that they would receive further payments for that time should a new contract with an increased wage scale be agreed upon. If they had been members of the Union, they would have been within the contract and would have received the extra money. It was not the fault of the employer that they were unacceptable as Union members. The Union employees were so paid because that was the employer's contract obligation to them. The non-Union employees made no attempt to correct the anomalous situation either by petitioning the Board for an election of a bargaining agent or any other

action under the Act or in the State Courts with the exception of this proceeding. *Under all the facts we fail to see the existence of discrimination.*" *Supra*, at page 551. (Italics supplied.)

That case is identical in every point of substance to the one now under consideration. The collective bargaining agreement involved in the instant case was negotiated by the Suburban Wholesalers' Association representing many news delivery companies engaged in the same type of work. Both *Reliable Newspaper Delivery, Inc.* and *Gaynor News Company, Inc.* are members of this Association, and therefore operated under exactly the same contract. They were both represented by present counsel. The same Union was involved and the same employment practices existed. The Third Circuit held in the *Reliable* case that that company was *not* guilty of discrimination within the meaning of the Act for indulging in the very same practice for which the Second Circuit found Gaynor News Company, Inc. guilty of the unfair labor practice of discrimination. In this case, the petitioner was entitled to rely upon its collective bargaining contract as the basic arrangement between itself and its employees. Those non-Union employees to whom the contract did not apply, except to provide that their employment was terminable at will (See B. A., p. 123), retained a status common to the majority of employees everywhere—a non-contractual employee/employer relationship. They lost nothing to which any rule of law, wage statute or individual contract entitled them. Having accepted the benefits of their employment with the petitioner and being aware from the start that their employment status was terminable at will (G. A., pp. 5, 6, 7, 8, 9), these employees can hardly be said to have suffered the traditional oppression which Section 8(a)(3)

sought to relieve, to wit: coercive measures such as discharge, demotions or other disciplinary action designed to inhibit their freedom of choice.

Certainly not all disparate treatment is "discrimination" under the Act, but only such disparate treatment as has the purpose and effect of bringing pressure to bear upon the free selection of a bargaining representative. *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937).

The type of benefit which the Board claims for these non-Union employees was in the nature of a very special concession; retroactive pay based on the timing of a collective bargaining contract with that of an affiliated industry dealing with the same Union, and vacation benefits based upon a continuing contractual relationship.² The denial of such benefits to temporary personnel who are not members of the bargaining Union is not so unreasonable as to constitute unlawful discrimination. This petitioner was under no duty to equalize all benefits paid to its employees; neither the Wagner Act nor the Labor-Management Relations Act purport to be a fair labor standards act.³

The Board does not attempt to distinguish this aspect of the *Reliable* case, *supra*, except to say that a different proportion of Union and non-Union employees existed in

² Paragraph 19-a of the 1946 contract (B. A., p. 125) used the July 17th date upon which retroactive pay was computed, because the Union's contract with the Publishers, the affiliated industry upon which this petitioner's contract with this Union is associated, expired on that date.

³ The *reductio ad absurdum* is reached when benefits voluntarily conferred by this employer are considered. As a matter of good personnel relations with its permanent employees, this employer voluntarily credited them with an extra week of vacation pay. Is it to be penalized for this gesture by now being required to extend such payment to persons whom it did not contemplate in making its original offer?

that case. The Second Circuit adopted the Board's views based on that distinction, although it is not clear what the effect of such a distinction might be. Indeed, throughout the Intermediate Report made by the Board's Trial Examiner and upon which the Board based its decision, the facts of the *Reliable* case, *supra*, are relied upon as "strikingly similar" (B. A., p. 34) and as authority for the ultimate findings of the Board in this case (B. A., p. 37). It was only upon the denial by the Third Circuit of enforcement of the Board's order in that case that the Board has suddenly found it distinguishable in fact (B. A., pp. 20-23). In any case, no distinction in fact suggested by the Board or by the Second Circuit bears in any way upon the argument made here that no discrimination as required by the Act has been proved.

In another case which involved an interpretation of Section 8(a)(3) the Circuit Court of Appeals for the Eighth Circuit had to deal with substantially similar questions to those involved in the case at hand. In that case the Board had found an employer guilty of violating Section 8(a)(3) in that he encouraged Union membership in one Union and discouraged it in another. The facts were as follows:

The employer had a collective bargaining contract with the International Union of Operating Engineers, Hoisting and Portable, Local No. 101 of Greater Kansas City and Vicinity, A. F. of L. The National Union's charter provided for the issuance of subcharters to local Unions for apprentice units and such a unit was formed at the site of one of the employer's construction projects. The apprentice unit was designated as 101-B. The Union's seniority rule in effect at the time provided that after an employee was a member of the apprentice unit for five years and qualified on the various types of equipment, he was then

eligible for membership in the parent Union. However, in the event of layoffs all members of the parent Union were to have a preference to apprentices who must all be laid off before any member of the parent Union was discharged, regardless of the status of seniority on a project. The employer was compelled to reduce the size of his working force on this particular project, and therefore, according to the seniority rule a member of the apprentice unit was discharged. The Court found that under these circumstances the employer was not guilty of violating Section 8(a)(3). It stated at page 705, *supra*:

"It must be borne in mind that he [the discharged employee] was not eligible to membership in Local 101 and he actively sought such membership prior to the instant here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Pickard [the discharged employee] could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstance could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed, at least by any act of the respondent company. It could scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing." *N. L. R. B. v. Del E. Webb Construction Co. et al.* (C. C. A. 8), 196 F. 2d 702 (1952).

The Court then goes on to cite the *Reliable* case, *supra*, with approval.

In still another case involving similar questions regarding the interpretation of Section 8(a)(3) the court held that an employer cannot be found guilty of encouraging

or discouraging Union membership unless his acts were done for that purpose and that such acts had that effect. *N. L. R. B. vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc. Local Union No. 41, A. F. of L.* (C. C. A. 8), 196 F. 2d 1 (1952). In that case the employer kept a seniority list from which men were assigned their work. One of the employees failed to pay his Union dues and according to a by-law in the Union charter thereby forfeited his standing on the seniority list. Accordingly, the Union requested the employer to reduce this man's seniority from 18th on the list to the bottom or 54th position, as a result of which the employee lost work on several occasions and instituted this charge. The Court states on page 3, *supra*:

“The question confronting us therefore is whether there is substantial evidence to support the finding that such discrimination would or did ‘encourage or discourage membership in any labor organization’ in violation of Section 8(a)(3) of the Act. *Discrimination alone is not sufficient.*” (Italics supplied.)

Here the court also cites and follows the *Reliable* case, *supra*, and goes on to state on page 4, *supra*:

“Having considered the record as a whole we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] did or would encourage or discourage membership in any labor organization * * *.”

In the court's analysis it stated that theoretically discrimination can be a violation of Section 8(a)(3) but only where there is substantial evidence to indicate that the act of discrimination was done with the intention of

encouraging or discouraging Union membership and that it did or would have such effect.

(b) The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.

The petitioner is charged with encouraging membership in a labor organization to which it was and is fundamentally and bitterly opposed (G. A., pp. 12 and 13) and which organization has indicated clearly that it would not accept such membership in any event (G. A., pp. 3, 4, 5, 6, 7). It is accused of encouraging employees whose affiliation in the particular Union have never been of the least concern to the petitioner. As a matter of fact, it is clear from the circumstance of this case that such affiliation by any non-union employee would have represented a financial loss to petitioner, since he would thereby have been brought under the contract.

It is the petitioner's contention that this anomaly is the result of an erroneous interpretation by the Board of Sec. 8(a)(3) of the Act or more properly Sec. 8(3) of the Wagner Act.⁴ That section as was relevant to this problem at the time of the alleged discrimination read as follows:

“Section 8(a). It shall be an unfair labor practice for an employer * * * (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: * * * ”

⁴ The Wagner Act applies to all questions of discrimination in this case since although the benefits of union members were paid after the effective date of the Taft-Hartley Act, they were based upon the contract arising prior to such date, and therefore fell within Section 102 of the Taft-Hartley Act which refers the question of unfair labor practices arising out of the performance of such contracts to the language of the Wagner Act.

The Board contends as a legal proposition that once it has proved disparate treatment as between union and non-union employees, it has proved all that is required of Sec. 8(3) (Board's brief in the CCA, p. 8). In other words, the Board contends that the unfair labor practice prohibited by Sec. 8(3) is primarily "discrimination" and that "once it appears that an employer has, in fact, discriminated among his employees on the basis of their union membership" (Board's brief in the CCA, p. 8) the Act is satisfied.

But it is clear that the unfair labor practice defined in this section is "to encourage or discourage membership in any labor organization", while "discrimination" is merely a limiting method by which the unfair labor practice occurs (Compare Sec. 8(4) which specifically makes it an unfair labor practice to "discriminate").

The curious interpretation by which the Board has short-cut the language of Sec. 8(3) has not passed unnoticed by the commentators; Prof. C. C. Ward in his article "Discrimination under the National Labor Relations Act" (1939) 48 Yale L. J. 1152, states as follows:

"In each of the sub-sections (1), (2), (4) and (5) the definition of the substantive unfair labor practice follows immediately the word 'to'; that is, the conduct which is made the basis of liability for violation of the act is described after the word 'to' in four out of the five sub-sections. There is no reason to believe that that is not also true in the fifth case, that of sub-section '(3)'. The unfair labor practice, sub-section (3) then—the basis of liability—is for an employer to 'encourage or discourage membership in a labor organization.' The words preceding 'to' in sub-section (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, 'discrimination' is the proscribed

means of encouragement or discouragement of membership in a labor organization, but the prohibited conduct is the *encouragement or discouragement* of membership * * *. The reports of the Senate and House Committees made it clear that the proper short statement of sub-section (3) is that it 'prohibits encouraging or discouraging membership in a labor organization by discrimination', and not as the Board puts it, that it 'prohibits discrimination because of Union activity.' But after only one year of administration of the Act, the Board abandoned its original interpretation of the statutory provision and introduced an idea of its own."

The Second Circuit followed the principle espoused by Prof. Ward in the above article in *N. L. R. B. v. Childs Co. et al.* (C. C. A. 2), 195 F. 2d 617 (1952) and stated:

"... the statute only prevents discrimination in regard to hire where the discrimination encourages or discourages membership in labor organizations. 29 U. S. C. A. Section 158(a)(3)."

Of course, the distinction between "discrimination" and "encouragement or discouragement" is ordinarily of slight significance since encouragement or discouragement of union membership may be assumed in the normal discrimination case. See Ward, *supra*, at page 1158. The phraseology of Section 8(3) becomes decisive only in the unusual situation, such as that presented here, in which discrimination is concededly not identified with any attempt by an employer to influence or coerce his employees in their selection of a bargaining representative.⁵

⁵ *NLRB v. Link Belt Co.*, 311 U. S. 584 (1941), cited by the Board (Board's brief in the CCA, p. 11) makes the point that the "normal" case is to be distinguished from the "rare" case; this is precisely the point which the petitioner is attempting to establish here in the interpretation of §8(3).

The requirements of proof become somewhat clearer when we shift the analytic emphasis to "encouragement or discouragement". The Board must prove that an employer intended to encourage or discourage union membership and that his action had that effect. In the normal case, these elements of purpose and effect run together in a single pattern of discriminatory activity in which the individual requirements of proof are obscured. In the unusual case, such as the one at hand, it is vital that they be precipitated out of the compound and separately applied.

The Board disputes that these requirements of proof exist independently, but this cannot be questioned in view of the almost unanimous concurrence of the Circuit Courts of Appeals. The following excerpts illustrate beyond any question of a doubt the necessity of sustaining the burden of proof that the discrimination alleged had both the *purpose* and the *effect* of encouraging or discouraging union membership.

"Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." *NLRB v. Air Associates*, (CCA 2), 121 F. 2d 586, 592 (1941).

"To make out a case under Section 8(3), it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review." *Stonewall Cotton Mills v. NLRB*, (CCA 5), 129 F. 2d 629, 632 (1942), cert. den. 317 U. S. 667 (1942).

"It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of Section 8(3) of the Act." *NLRB v. Draper Corp.* (CCA 4), 145 F. 2d 199, 202 (1944).

"Under this Section of the Act (§8(3)) to constitute the unfair labor practice of discrimination, the discrimination in regard to hire and tenure must have the purpose 'to encourage or discourage membership in any labor organization' ". *Western Cartridge Co. v. NLRB.* (CCA 7), 139 F. 2d 855, 858 (1943).

"The burden * * * was upon the Board to prove affirmatively and by substantial evidence that Bullard and Lingle were discharged because of union membership and activities and for the purpose of discouraging membership in the union." *NLRB v. Reynolds International Pen Co.* (CCA 7), 162 F. 2d 680, 690 (1947).

"The prohibition of §8(3), by its plain terms, extends to any discriminatory discharge the purpose and manifest effect of which is to discourage employee membership in a labor organization." *Wells, Inc. v. NLRB.* (CCA 9), 162 F. 2d 457, 459-460 (1947).

"It may be taken as settled that the right of an employer to discharge an employee, for cause or without cause, is the same whether the employee is or is not a member of the union. An employer may not, however, discharge or discriminate between employees, whether or not members of a union, for the purpose of discouraging membership in, or action on behalf of, a union." *NLRB v. Robbins Tire & Rubber Co.* (CCA 5), 161 F. 2d 798, 801 (1947).

It is therefore well settled that these requirements do exist and the question then becomes how each is to be applied to a particular situation and what type of evidence will satisfy such requirements and whether that evidence appears on the record.

The Board contends that since petitioner "discriminated against employees because they were not union

members" (Board's brief in the CCA, p. 10) its intent to encourage membership is automatically established. Such a statement of the case in the light of the unique circumstance here involved is somewhat flippant and misleading. The petitioner did not discriminate against Loner *because* he was not a union member. Assuming that the petitioner discriminated, it did so because in its sound business judgment it felt that Loner was not entitled to the particular benefit involved and that since the petitioner was not obligated contractually or otherwise to pay him such benefit, they did not do so. That is quite different from the cases cited by the Board in its brief in the Second Circuit in which the employer made a deliberate selection in favor of a particular union which effectively bound his employees to become members of that union and to lose their jobs. Union membership was the specific center of a controversy and the unilateral action on the part of the employer determined the membership of his employees. Here, union membership as such, is not even remotely involved.

Similarly, the Board's argument that such proof of intent goes merely to the question of whether or not discrimination occurred (Board's brief in the C. C. A., p. 9) is completely inconsistent with the cases cited above in which the courts specified that it is "intent to encourage or discourage union membership" to which they refer. The notion that this is merely a method of establishing "good faith" on the part of an employer in mitigation of the remedy to be imposed against him (Board's brief, in the C. C. A., p. 10) is completely unsupported by the language of the Act. If the Act meant to provide for "good faith", it would have contained a good faith provision. Cf. Fair Labor Standards Act, 29 U. S. C. A., Section 216.

The Board like any other litigant is entitled to rely upon objective facts to support an inference that a particular intent existed. But the presumption thus created is not an absolute, irrebuttable presumption. It exists only in the *absence* of evidence to the contrary. In this case petitioner attempted to introduce that evidence—that Loner's membership in the union had been sought and rejected, and that, under the circumstance the employer's action could not have intended to encourage a result which all parties knew to be impossible (G. A., pp. 3, 4, 5, 6, 7, 19). The Board's duty to come forward with the controverted evidence is apparent; in place of such evidence it makes the suggestion, unsupported by any evidence whatsoever that membership in the union might be achieved "by any one of a number of steps, from bribery to legal action" (Board's brief in the CCA, p. 23, fn. 23).

It is obvious why the Courts have required independent proof of intent where such proof is controverted. The unfair labor practice sections of the act are, in one sense, penal sections; violation of the rules they established may impose serious financial loss upon an employer and subject him to suffer restrictions in his future relationships with his employees. The imposition of these penalties certainly should require a showing of intent to violate the Act and to obtain the result prohibited by it. The words of the statute itself lend credence to this argument. This argument has been stated cogently by one of the commentators, as follows:

"The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when

the aggressor is not actuated by a desire to protect a recognized interest, the basis for his excuse disappears. This philosophy is embeded in Section 8(3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful. Cox, *supra*, at 274."

On the evidence put forth in this case it cannot seriously be said that the petitioner *intended* to encourage a result which it knew could not occur and which, if it ever did occur, would not only have been a disadvantage to it, but would have involved certain financial loss.

3. The Necessity of Proving Effect.

To state that Section 8(a)(3) or its predecessor 8(3) do not require independent proof that encouragement of union membership actually occurred, is to state that a statute describing X as a crime does not require that the occurrence of X be proved. Nevertheless the Board contends that so long as a "necessary tendency" toward encouragement may be inferred, a violation of the Act has occurred although encouragement as such may not have occurred.

Again, as with the case of intent above, the Board is speaking the language of evidence, not of statutory interpretation. It may be true that where a "necessary tendency" may be inferred from the underlying facts the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually proving that a certain person or persons were actually

encouraged. See *N. L. R. B. v. Engelhorn & Sons* (C. C. A. 3), 134 Fed. 2d, 553, 557 (1943). But where it can be shown that under all the circumstances encouragement of union membership is a logical absurdity all of the "necessary tendency" and "natural and probable effect" (B. A., p. 39) in the world cannot suffice to establish such encouragement as a finding of fact. As the Court in the *Reliable* case stated:

"It would be necessary for us to completely close our eyes to the admitted facts in order to accept the Board's statement that the inevitable effect of the back wage payment was to encourage union membership because we know that membership in the union for non-union workmen was a practical impossibility" *Id.*, at page 552.

This situation may be compared with a similar one presented to the Second Circuit in *N. L. R. B. v. Air Associates* (C. C. A. 2), 120 Fed. 2d, 586 (1941). In that case an employer was charged with discriminately discharging two employees who were not union members. The Board argued that such discharges were made in order to create resentment against the union. That Court stated that it was impossible to infer from this that the discouragement of union membership had occurred; Judge Frank for the Court stated:

"But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the act or findings from which such an effect might reasonably be inferred" *supra*, at page 592.

Judge Frank later referred to the Board's finding in that case as creating a legal absurdity in *Perkins v. Endicott*.

Johnson Corporation (C. C. A. 2), 128 Fed. 2d, 208 (1941) at pages 221-2, as follows:

“... there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate union employees, previously discharged, could conceivably discourage membership in a union, in violation of Section 8(3) of National Labor Relations Act, 29 U. S. C. A., Section 158(3).”

In the past the Courts have consistently sought to analyze the actual effect an employer's action may have upon union membership. Thus in *Quaker City Oil Refining Corporation v. NLRB*, 119 Fed. 2d, 631 (1941), the Court stated as follows:

“It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union.” *Supra*, at page 633.

This language was approved and applied in *N. L. R. B. vs. Public Service Transport*, 177 F. 2d 119 (1949).

The petitioner offered to prove that Loner had applied for union membership long before the question of retro-active pay arose, had been unsuccessful in achieving that goal and was, in fact, ineligible for such membership. Assuming this to be true the Board is in the position of accusing respondent of encouragement, where no encouragement was necessary and of encouraging a result which upon the offered evidence, was impossible of achievement. To find the unfair labor practice of encouragement under such circumstances would be a complete *non sequitur*.

POINT II.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges.

Only one of petitioner's employees filed a charge against petitioner. Nevertheless, petitioner found itself, nearly two years later, faced with a complaint extending that charge to include, without further designation, all of petitioner's non-union employees. Petitioner contends that this is neither equitable nor is it authorized by the Act.

The Board blandly asks why petitioner should complain of the inclusion of all non-union employees when such inclusion occasioned no "hardship or surprise" to it. In the first place, petitioner has the right of any person or corporation to be required to defend only those charges which are actually brought against it. Nothing in the Act empowers the Board to solicit litigation on the part of individuals who, for whatever reason, have not themselves instituted proceedings or to initiate proceedings on its own initiative. *Consumers Power Co. v. NLRB*, (CCA 6) 113 F. 2d 38 (1940). Although the Board may enlarge upon unfair labor practices set out in the original charge, that is quite different from what the Board attempts to do here in actually initiating charges on behalf of employees who did not themselves either institute them or indicate on the Record that they wished such charges brought in their behalf. In the second place, a class suit of the type which the Board has apparently spun from air is a particularized form of action which, if it were to be part of the Board's arsenal, should have been specifically authorized by Congress. (See Federal Rules of Civil Procedure §23.)

Furthermore, Congress indicated its intention to enable employers, after a six-months period, to draw the line against potential liability greater than that indicated by the charges as filed and mailed to them. A procedure by which a single charge filed by a single employee might serve as a bridge for countless other claims filed two or three years later would, in a vital respect, undermine Congressional intention in this regard and completely vitiates the purpose of § 10(b).

Finally, the nature of the testimony which petitioner sought to adduce and which the Third Circuit treated as highly relevant in the *Reliable* case was personal testimony of a sort which would certainly differ as between different non-union employees. Petitioner having raised the issue that, under the circumstances of this case, union membership was and is an illusory factor, the testimony of each such claimant is required. The burden was not petitioner's; the Board's presumption that petitioner's acts "tended to" encourage membership having been met, the burden was upon the Board to come forward with the evidence. This is precisely what the Board attempts to do by unsupported inference when it states in its brief that "frustrated applicants" for union membership "might seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action" (Board's brief in C. C. A., p. 23, fn. 23). Surely such proof, if it existed, would bring into controversy the testimony of many employees which testimony petitioner would have the right to anticipate. Thus, it is not true that the situation of all employees is "identical to that of the employee who filed the charge" and the failure on the part of the Board to define, name or produce those employees renders its Order unenforceable as to them.

Conclusion.

In view of the diametrically opposed views held by the various Circuit Courts of Appeals in their interpretation of this important Federal Statute, it is submitted that a writ of certiorari should be granted.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

HARRY S. BANDLER,
JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

Dated: New York, September 23, 1952.

LE COPY

No. ~~371~~ 7

Office - Supreme Court, U.S.

FILED

APR 9 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

BANDLER, HAAS & KASS,
Attorneys for Petitioner,
11 Broadway,
New York 4, N. Y.

✓
JULIUS KASS,
MAURICE H. GOETZ,
Of Counsel.

BLEED THROUGH- POOR COPY

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	7
ARGUMENT:	
I. The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.....	10
A. The Board's interpretation of Section 8(a)(3) is erroneous.....	10
B. The Board has failed to prove that peti- tioner discriminated against Loner within the meaning of the Act.....	21
C. The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.....	21
1. The Necessity of Proving Purpose....	24
2. The Board failed to prove by substan- tial evidence on the record considered as a whole that the conduct com- plained of encouraged Union member- ship	29
3. The Necessity of Proving Effect.....	32
II. Legislative History	34

	PAGE
III. An illegal Union security clause does not void an entire contract which also contains savings and separability clauses.....	36
IV. The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges before the statute of limitation expired.....	39
CONCLUSION	42
APPENDIX	1a

TABLE OF CASES.

	PAGE
<i>Allis-Chalmers Mfg. Co. v. NLRB</i> (C. C. A. 7, 1947), 162 F. 2d 435.....	25
<i>Associated Press v. NLRB</i> , 301 U. S. 103 (1937).....	16
<i>Colgate-Palmolive-Peet Co. v. NLRB</i> , 338 U. S. 355 (1949)	35
<i>Consumers Power Co. v. NLRB</i> (C. C. A., 6, 1940), 113 F. 2d. 38.....	39
<i>Marine Engineers' Beneficial Association, No. 13 v.</i> <i>NLRB</i> , C. C. H. 23 Labor Cases ¶67, 447.....	40
<i>National Labor Relations Board v. Reliable News-</i> <i>paper Delivery, Inc.</i> (C. C. A. 3, 1951), 187 F. 2d 547	7, 14, 15, 17, 33, 41
<i>National Labor Relations Board v. International</i> <i>Brotherhood of Teamsters, Chauffeurs, Ware-</i> <i>housemen and Helpers of America, etc., Local</i> <i>Union No. 41, A. F. of L.</i> (C. C. A. 8, 1952), 196 F. 2d 1, (1952).....	19, 20
<i>Newspaper & Mail Deliverers' Union of New York</i> <i>and Vicinity v. Newark News Dealers Supply Co.,</i> <i>Inc.</i> , 303 N. Y. 860 (1951).....	6
<i>N. L. R. B. v. Air Associates</i> (C. C. A. 2, 1941), 120 Fed. 2d, 586.....	33
<i>NLRB v. Child's Co. et al.</i> (C. C. A. 2, 1952), 195 F. 2d 617	22
<i>NLRB v. Don Juan</i> (C. C. A. 2, 1950), 185 F. 2d 393....	25
<i>NLRB v. Engelhorn & Sons</i> (C. C. A. 3, 1943), 134 Fed. 2d, 553, 557.....	32
<i>NLRB v. Gluck Brewing Co.</i> (C. C. A. 8, 1944), 144 F. 2d 847.....	25
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1, 1937	26
<i>NLRB v. Link Belt Co.</i> , 311 U. S. 584 (1941).....	22
<i>NLRB v. Local 57, International Union of Operating</i> <i>Engineers, et al.</i> (C. C. A., 1).....	39
<i>NLRB v. Pittsburgh Steamship Co.</i> , 340 U. S. 498 (1950)	28, 31

	PAGE
<i>N. L. R. B. v. Public Service Transport</i> , 177 F. 2d 119 (1949)	34
<i>NLRB v. Rockaway News Supply Co., Inc.</i> , No. 318....	37, 38
<i>NLRB v. Standard Oil Co.</i> (C. C. A., 2) 138 F. 2d 885, 887	29
<i>Perkins v. Endicott-Johnson Corporation</i> (C. C. A. 2, 1941), 128 Fed. 2d, 208.....	33
<i>Quaker City Oil Refining Corporation v. NLRB</i> , 119 Fed. 2d, 631 (1941).....	34
<i>Republic Aviation Corp. v. NLRB</i> , 324 U. S. 793 (1945)	28
<i>Universal Camera Corp. v. NLRB</i> , 340 U. S. 474 (1950)	28, 30
<i>Wilson & Co. v. NLRB</i> (C. C. A., 7) 126 F. 2d 114, 117	29

STATUTES.

28 U. S. C. 1254 (1).....	1, 2
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. 151, <i>et seq.</i>).....	2, 1a
129 U. S. C. Sec. 158 (a) (3) 2d proviso.....	8
Labor-Management Relations Act of 1947.....	2, 7
Section 8 (a) (1).....	8
Section 8 (a) (2).....	8, 9, 35, 36, 37
Section 8 (a) (3) and 8 (3).....	2, 8, 10, 11, 13, 16, 17, 18, 20, 21, 32, 35
Section 8 (4).....	11
Section 102	8
Section 10 (b).....	9, 41
29 U. S. C. A. 158 (4).....	11
Fair Labor Standards Act, 29 U. S. C. A.....	25
Section 216	25
Federal Rules of Civil Procedure.....	40
Section 23	40

AUTHORITIES.

	PAGE
" <i>Discrimination Under the National Labor Relations Act</i> ", (1939) 48 Yale Law Journal 1152.....	12
" <i>Some Aspects of the Labor-Management Relations Act of 1947</i> ", 61 Harv. L. Rev. 1, 274.....	26
Conf. Rep. H. R. 3020, 80th Cong., 1st Sess.....	28, 30
Congressional Record, 80th Cong., First Sess., 93 Cong. Rec. 3471 to 3475; 93 Cong. Rec. 3950, <i>et seq.</i>	35
<i>Report of Senate Committee on Labor and Public Welfare</i>	35
Sen. Rep. No. 105, 80th Cong., First Sess. (1947), pages 6-7	35
82d. Cong., 1st Sess. Sen. Rep. No. 646; House Rep. No. 182; P. P. L. 189.....	37

BLEED THROUGH- POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

GAYNOR NEWS COMPANY, INC.,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.*

BRIEF FOR PETITIONER.

The Petitioner seeks a review under 28 U. S. C. 1254 (1) of a decree of the Circuit Court of Appeals for the Second Circuit, entered on July 8, 1952 (R. 129-132), enforcing an Order issued by the National Labor Relations Board against Gaynor News Company, Inc. (R. 7-12). Petition for Certiorari was filed on October 2, 1952 and Certiorari was granted on March 9, 1953.

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit were filed on June 24, 1952 (R. 121-128), and are reported at 197 F. 2d 719. Findings of fact, conclusions of law and order of the National Relations Board (R. 7-44) are reported at 93 NLRB 299.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

The particular facts in this case also place it within the purview of Supreme Court Rule 38, Paragraph 5 (b), which recognizes the jurisdiction of this Court to accept cases in which a Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Statute Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V. 151, *et seq.*), are set forth in the Appendix, *infra*, pages 1a-3a.

Questions Presented.

1. Can an employer be held guilty of an unfair labor practice under Section 8 (a) (3) of the Labor-Management Relations Act of 1947, which provides that he may not encourage or discourage membership in any labor organization by discrimination in regard to any terms or conditions of employment, where there is no evidence that the acts complained of actually encouraged or discouraged such membership, or that that was their purpose?

2. May the Board "amend" original charges, so as to add new parties and new substantive allegations which were not included in the original charge long after the six months statute of limitations period provided in § 10(b) of the Act has expired?

3. Can the National Labor Relations Board void an entire contract which contains a union security clause later found to be illegal, in spite of the fact that the contract contains savings and separability clauses which attempt to provide for precisely that type of situation?

Statement of the Case.

There is little dispute as to the underlying facts in this case. Gaynor News Company, Inc., (hereinafter referred to as Petitioner) is engaged in the wholesale distribution and delivery of newspapers and periodicals. In 1946 it concluded a valid closed shop agreement with the Newspaper and Mail Deliverers' Union of New York and Vicinity, (hereinafter referred to as the "Union"), restricting employment in Petitioner's business to members of the Union. However, employment of non-Union employees was permitted pending such time as the Union could supply Union employees. This Union was, for all practical purposes, a closed Union and did not accept new members except for first-born legitimate sons of Union members. The non-Union employees, whose rights and status are here involved, did not have tenure in that they could be validly discharged any time the Union supplied members to replace them. Obviously, they were not covered by the closed shop contract, since, as with every closed shop contract, it was applicable to Union members only.

The specific charge in this matter was brought by a single non-Union employee, (hereinafter referred to as "Loner"), to the effect that Petitioner was guilty of encouraging Loner's membership in the Union by its failure to pay him a certain amount of retroactive pay received by Petitioner's permanent Union personnel under its con-

tract and a vacation benefit which Petitioner voluntarily granted its regular employees.¹ A complaint issued on the basis of the charge in February 1949 and an "amended" complaint issued in June 1950, which raised, for the first time, the question of the invalidity of the 1948 contract, and which also raised, for the first time, the charge that the employer had similarly discriminated against many other persons not named. A hearing was held before a Trial Examiner on July 17-19, 1950 who found that Petitioner had committed the unfair labor practice specified in the charge and recommended that an Order issue extending the benefits claimed, not only to Loner, but to all non-Union employees similarly situated. The National Labor Relations Board issued its Order, as recommended, and the case was taken to the United States Court of Appeals for the Second Circuit on Petition for Enforcement. That Court modified the Order of the National Labor Relations Board insofar as it forbade the Union to continue to enjoy representative status and conduct negotiations on behalf of its employee members. The remainder of the Order was directed to be enforced as made.

Admittedly, neither the charge nor the complaint is supported by *any* evidence that Petitioner had the slightest interest or motive with respect to Loner's affiliation or non-affiliation with the Union. Petitioner offered to show that Loner had long since applied for membership in the Union, had been denied such membership, and was, in fact, ineligible for such membership, but this testimony was barred (R. 105-109, 118-120). Petitioner also sought to show that Loner first obtained employment with Gaynor

¹ "Voluntarily" in the sense that it was not required by the collective bargaining agreement. In granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmonious labor relations with its permanent personnel.

News Co., Inc. through the efforts of the Union's business agent and that evidence was also barred (R. 109). The Board and the Circuit Court of Appeals for the Second Circuit held that the purpose and effect of Petitioner's actions were immaterial and that it was guilty of unfair labor practices on the ground that the conduct here involved was "inherently conducive" or had a "natural tendency" toward increasing Union membership.

Petitioner's position is that, since it was not contractually bound to pay extra benefits to its relatively temporary non-Union employees, in its business judgment, it did not do so. The factors influencing its choice clearly had no relation to any inclination on Petitioner's part to see Loner become a member of the Union, nor to the possibility that such membership would occur. On the contrary, under the peculiar circumstances in this case, Petitioner would have been much more interested in keeping its temporary non-Union personnel in *statu quo*, since they would thereby continue to be contractually ineligible for extra benefits.

It is important to distinguish between the 1946 contract, the validity of which is not in dispute, and the 1948 contract which the Board seeks to set aside at this late date. The 1946 contract obviously did not cover non-Union employees since it was a closed shop contract. The contract entered into on October 25, 1948 raised a question of doubt as to that issue. Assuming, *arguendo*, that the latter contract did cover non-Union employees, it would appear that at most Petitioner was guilty of a breach of contract with its non-Union employees. However, Petitioner stands here accused, not of a breach of contract, but of an unfair labor practice. The allegedly aggrieved employees have an ample remedy at law for whatever

damages they may have suffered, as a result of any breach of contract. Certainly, it has never been suggested that the National Labor Relations Board is the proper forum in which to try breach of contract actions. An unfair labor practice finding results in severe penalties being imposed upon an employer in his future relationship with the collective bargaining representatives. It carries with it innuendoes and implications of a far-reaching nature having nothing to do with a sincere misunderstanding of contractual terms. Where similar circumstances created doubts as to the coverage afforded non-Union employees by a collective bargaining agreement, the aggrieved employees brought suit in the New York Supreme Court and the matter was finally determined in their favor, at which time the judgment rendered against the employer was paid in full. *Newspaper & Mail Deliverers' Union of New York and Vicinity v. Newark News Dealers Supply Co., Inc.* 303 N. Y. 860 (1951). This is not the case of an employer seeking to evade responsibility for his conduct. This is a case in which the employer is charged with "encouraging" Union membership in a Union with which it has had a prolonged and controversial relationship.

It is not questioned that the the Union and Petitioner are, and always have been, at "arms length" in the most traditional employer-union sense. The bitterness of the protracted negotiations preceding both the 1946 and 1948 contracts is undisputed and not controverted (R. 112- 113). Thus, the contention by the Board that Petitioner is guilty of assisting and encouraging membership in a Union to which it has always been bitterly opposed is anomalous. The decisions of the Board and the United States Court of Appeals for the Second Circuit find Petitioner guilty of encouraging membership in a Union it strongly opposes and which clearly would not accept the membership al-

legedly sought to be encouraged. This just does not make any sense. After all, in the field of labor relations one is supposed to be realistic.

Summary of Argument.

Petitioner contends that the Board has failed to prove, under the circumstances of this case, that the purpose and effect of Petitioner's actions were to encourage Union membership. In fact, it was and is common knowledge in the industry that at all times relevant, this Union was a closed Union for all practical purposes and no act by Petitioner could possibly assist or encourage any of its employees to seek membership. In addition, the non-Union employees had already sought such membership and had been rejected because of the Union policy of not accepting new members except for the eldest legitimate male issue of members in certain cases. In view of the lack of substantial evidence or, indeed, of any evidence at all to support the allegation that Petitioner encouraged Union membership, the finding to that effect must be overruled.

There is ample authority directly on point. In *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.* (C. C. A. 3, 1951), 187 F. 2d 547, the Third Circuit ruled upon the same problem with respect to the identical contracts and, to all intents and purposes, the identical parties, since *Reliable Newspaper Delivery, Inc.* belongs to the same association that negotiated this contract on behalf of *Reliable*, Petitioner, and all other members. That Court ruled that the situation was completely outside of the protection of the Act and that no unfair labor practice had been committed by the employer in that case. In addition, Congress itself has clearly manifested its intentions with regard to the issues involved herein. The Taft-Hartley

Act (Labor-Management Relations Act of 1947) amended the Wagner Act, which governs this matter,² so as to specifically cover the situation presented here, indicating its understanding that the situation in this case had been left open by that former Act (129 U. S. C. Sec. 158 (a) (3), 2d proviso). See *NLRB v. Reliable Newspaper Delivery, Inc.*, *supra* at 552, fn. 8.

With respect to Section 8 (a) (1), it is clear from the Intermediate Report that no independent violation of that Section is charged; that report, adopted by the Board in its decision and order, charges Petitioner with the violation of Section 8 (a) (3) of the Act, "thereby" interfering with the rights of its employees in violation of Section 8 (a) (1) (R. 29). No other reference to that Section appears except as a coverall for specific unfair labor practices.

The Board's contention with respect to Section 8 (a) (2) is meaningless at this time. Petitioner signed its 1948 contract with the Union without the preliminary of a Union shop election; the Board concedes that Congress has since eliminated this requirement (Board's Brief in the C. C. A., p. 24). However, it insisted on voiding the entire contract in spite of separability and savings clauses. Nothing could possibly be gained by making the technical argument that a formal step, no longer required, was not complied with and, therefore, voids an entire contract. The only result would be to prevent Petitioner from bargaining with a Union with which it has had a long bargaining history and of whose representative status there has never been any

² The Wagner Act applies to all questions of discrimination in this case, since, although the benefits to Union members were paid after the effective date of the Taft-Hartley Act, they were based on a contract arising prior to such date and, therefore, fall within Section 102 of the Taft-Hartley Act, which refers the question of unfair labor practices arising out of the performance of such contracts to the language of the Wagner Act.

question. The opinion of the Circuit Court of Appeals modified the Board's Order to the extent that it permits the Petitioner and the Union to continue their relations under that contract, however the decree filed in the Circuit Court still orders the petitioner to cease giving any effect to its contract with the Union. (See R. 129 (1)(b).)

In addition, all of the charges are vulnerable to the Statute of Limitations contained in Section 10 (b) of the Act. The original charge in this matter was filed in February 1949 and merely dealt with the Petitioner's failure to pay Loner retroactive pay under the 1946 contract. The invalidity of the 1948 contract was not raised until an "amended charge" was filed in June 1950, nearly two years after the execution of the 1948 contract. The Board contends that the amended charge "relates back". The notion that an amended charge referring to the invalidity of a particular contract can "relate back" to an original charge, alleging completely separate unfair labor practices arising under a different contract, is illogical and circumvents the manifest intention of Congress as expressed in Section 10 (b) of the Act.

Although Loner was the only employee ever to file a charge in this case, the remedy of the Board extends to all other employees "similarly situated". Without further designation, the Board has thus employed a single charge, filed by a single employee, as the basis for issuing an Order, almost two years later, enlarging such charge to apply to unnamed employees, never identified either in the complaint or in the proceedings, who had not themselves raised any charge or indicated to Petitioner that they would make such charge. Such broad power is nowhere indicated in the Act from which the Board derives its authority. On the contrary, the Act makes the charge the specific procedural step by which the six months Stat-

ute of Limitations is, or is not, to be tolled (29 U. S. C. A. Sec. 160 (b)); the relatively short Statute of Limitations was enacted for the precise purpose of enabling employers to determine the extent of their potential financial responsibility and at as early a date as possible.

In addition, the conduct of a hearing by the Board, involving personal testimony of employees whom the Board neither identified nor called to testify, and who therefore were not available for cross examination, is a denial of due process.³

ARGUMENT.

I.

The Board has failed to prove that petitioner violated Section 8(a)(3) of the Act.

A. The Board's interpretation of Section 3(a)(3) is erroneous.

The basic error in the Board's approach to the interpretation of Section 8 (3)⁴ is revealed in a simple comparison between the language of the statute and the language used by the Board, both in its decision and in its brief before the Circuit Court of Appeals. The statute, in relevant part, states as follows:

³ Petitioner has raised the issue that encouragement of Union membership under the peculiar circumstance of this matter could not have occurred. It, therefore, devolves to the Board to introduce "substantial evidence" or, indeed, any evidence at all that the acts complained of had the effect of encouraging Union membership. In addition, Petitioner would certainly have the right to cross examine complainants who were alleged to have been "encouraged" on the question of actual effect.

⁴ The applicability of Section 8 (3) of the Wagner Act rather than 8(a)(3) of the Taft-Hartley Act, is discussed herein *supra*, fn. 2.

"SECTION 8: It shall be an unfair labor practice for any employer * * *

(3). *By* discrimination in regard to hire or tenure of employment or any term or condition of employment *to* encourage or discourage membership in any labor organization . . ." (Emphasis supplied.)

It is clear that the unfair labor practice defined in the statute is "to encourage or discourage membership in any labor organization". "Discrimination", on the other hand, is merely limiting the method by which the unfair labor practice occurs, rather than an independent unfair labor practice. This is emphasized, by reference to Section 8 (4) (29 U. S. C. A. 158 (4)), which makes it an unfair labor practice "to discriminate" in certain instances.⁵ Thus, in Section 8 (4), discrimination is treated as an independent unfair labor practice; in Section 8 (3), it is not.

But the Board's analysis, as clearly revealed in its decision affirming the Intermediate Report of the Trial Examiner, insists that disparity alone along Union lines is sufficient grounds upon which to base the unfair labor practice of Section 8 (3). The Board's erroneous interpretation of the words of the statute is also emphasized by the incorrect paraphrase of the statute by counsel.

Note the elimination of the important qualifying word "by" before the word "discrimination" in the foregoing paraphrase. This clearly reflects a startling inability on

⁵ Sec. 8 "It shall be an unfair labor practice for an employer

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;"

"This Section prohibits 'discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization' " (Board's Brief in the C. C. A., p. 7).

the part of the Board to read the statute correctly. This curious phenomenon has been commented upon by several writers, among them Professor Chester C. Ward in his article, "*Discrimination Under the National Labor Relations Act*", (1939) 48 Yale Law Journal 1152, as follows:

"In each of subsections (1), (2), (4) and (5), the definition of the substantive unfair labor practice follows immediately the word 'to'; that is, the conduct which is made the basis of liability for violation of the Act is described after the word 'to' in four out of the five subsections. There is no reason to believe that that is not also true in the fifth case, that of subsection (3). The unfair labor practice under subsection (3), then—the basis of liability—is for an employer 'to encourage or discourage membership in a labor organization.' The words preceding 'to' in subsection (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, 'discrimination' is the proscribed means of encouragement or discouragement of membership in a labor organization, but the prohibited conduct is the encouragement or discouragement of membership. . . . The reports of the Senate and House Committees make it clear that the proper short statement of subsection (3) is that it 'prohibits encouraging or discouraging membership in a labor organization by discrimination,' and not, as the Board put it, that it 'prohibits discrimination because of union activity.' But after only one year of administration of the Act, the Board abandoned its original interpretation of the statutory provision and introduced an idea of its own" (48 Yale L. J. 1152, 1156 (footnotes omitted)).

In the overwhelming majority of cases before the National Labor Relations Board, this distinction between "discrimination" and "encouragement and discouragement"

ment of Union membership" has little, if any, significance. Nearly all cases involving Section 8 (a) (3) or 8 (3) arise out of a labor situation in which an employer is engaged in a fight with a particular labor organization and has chosen to weaken it either by direct tactics, such as discharge or similar discrimination against Union leaders and members, or by indirect tactics, such as favoring one labor organization over another. In cases such as these, there is no question that discrimination in favor of or against Union members is based upon an attempt to unfairly encourage or discourage Union membership, and that the effect of such action will necessarily lead to such encouragement or discouragement. As Professor Ward states:

"Of course, no one would be fatuous enough to contend that discrimination, because of Union activities, will not constitute a violation of Section 8 (3) in, say, ninety-nine cases out of a hundred. But this is because such conduct by an employer ordinarily is purposed to discourage, and will also have the necessary effect of discouraging, membership in the Union concerned. This explains, perhaps, why the Board for so long had a perfect record in the Supreme Court in cases in which the Board has found a violation of Section 8 (3), and why the Supreme Court at first echoed the Board's language to the effect that Section 8 (3) forbids discharges because of Union activities. *The point of the actual language of the section has never been urged upon the Court, and the Court has no reason to presume that the Board, the body of experts charged with administration of the act, has been torturing the statutory language*". Ward, *supra*, at 1158 (Emphasis supplied).

In the case at bar, however, factors normally present in the application of Section 8 (3) are decidedly absent. No struggle for recognition on the part of the labor organi-

zation is involved; no so-called "concerted activities" are here interfered with; no bitter contest exists between two labor organizations, one of which is favored by the employer; the employer has nothing whatsoever to gain by the membership, or non-membership, of its non-Union employees in the bargaining Union. The non-Union employees, alleged to have been encouraged to join a labor organization, could not have entered the labor organization in question regardless of the employer's motive (R. 28, 105-106), and the labor organization clearly did not want them as is evidenced by its rules of admission which limit new members exclusively to the eldest legitimate son of a member in good standing more than 20 years. The employer's only interest in taking the action complained of was his normal and understandable desire to avoid making payments which he felt he was not legally obligated to make.

Thus, in this case, it does not follow that discrimination, based upon Union membership, is in any way connected with a desire on the part of the employer to defeat an existing Union by encouraging membership in another organization, nor that membership has actually been encouraged thereby.

B. The Board has failed to prove that petitioner discriminated against Loner within the meaning of the Act.

In *NLRB v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (1951), which involved the identical questions raised here, dealing with the identical collective bargaining contracts and with the identical situation with regard to non-Union employees, the Third Circuit found no "discrimination" within the meaning of the Act. In addition, the Court found no "encouragement of Union member-

ship" as required by the Act. As that Court cogently stated:

" * * * the employer did not deprive its non-Union workers of anything to which they were entitled. They had been given their full wages during the period which later became subject to Union retro-active pay. There was never any arrangement with them then, or later, that they would receive further payments for that time should a new contract with an increased wage scale be agreed upon. If they had been members of the Union, they would have been within the contract and would have received the extra money. It was not the fault of the employer that they were unacceptable as Union members. The Union employees were so paid because that was the employer's contract obligation to them. * * * *Under all the facts, we fail to see the existence of discrimination.*" *supra*, at page 551 (Italics supplied).

That case is identical in every substantive point to the one now under consideration. The collective bargaining agreement involved in the instant case was negotiated by the Suburban Wholesalers' Association, representing many news delivery companies engaged in the same type of work. Both *Reliable Newspaper Delivery, Inc.* and *Gaynor News Co., Inc.* are members of this Association and operated under exactly the same contract. They were both represented by present counsel. The same Union was involved and the same employment practices existed. The Third Circuit held in the *Reliable* case that that company was *not* guilty of discrimination within the meaning of the Act, for indulging in the very same practice for which the Second Circuit found *Gaynor News Co., Inc.* guilty of the unfair labor practice of discrimination to encourage Union membership. Petitioner was entitled to rely upon its collective bargaining contract as the basic arrangement between it

and its employees. Its non-Union employees, to whom the contract did not apply, except to provide that their employment was terminable at will (R. 98), retained a status common to the majority of employees everywhere. They lost nothing to which any rule of law, wage statute or individual contract entitled them. Having accepted the benefits of their employment with Petitioner and being aware from the start that their employment status was terminable at will (R. 108-109), these employees can hardly be said to have suffered the traditional oppression which Section 8 (a) (3) sought to relieve, to wit: coercive measures, such as discharges, demotions or other disciplinary action designed to inhibit their freedom of choice.

Certainly not all disparate treatment is "discrimination" under the Act, but only such disparate treatment as has the purpose and effect of bringing pressure to bear upon the free selection of a bargaining representative. *Associated Press v. NLRB*, 301 U. S. 103 (1937).

The type of benefit which the Board claims for these non-Union employees is in the nature of a very special concession; retroactive pay based upon the timing of a collective bargaining contract with that of an affiliated industry dealing with the same Union,⁶ and vacation benefits based upon a continuing contractual relationship. The denial of such benefits to temporary personnel, who are not members of the bargaining Union, is not so unreasonable as to constitute unlawful discrimination. This Petitioner was under no duty to equalize all benefits paid to its employees; neither the Wagner Act, nor the Labor-

⁶ Paragraph 19(a) of the 1946 contract (R. 99), used the July 17th date upon which retroactive pay was computed, because the Union's contract with the Publishers Association of New York, the affiliated industry upon which this Petitioner's contract with this Union is associated, expired on that date.

Management Relations Act, purport to be a fair labor standards act.⁷

The Board does not seriously attempt to distinguish the *Reliable* case, *supra*, except to say that a different proportion of Union and non-Union employees existed in that case. The Second Circuit adopted the Board's views based on that distinction, although it is not clear what the effect of such a distinction might be. Indeed, throughout the Intermediate Report, made by the Board's Trial Examiner and upon which the Board based its decision in this case, the facts of the *Reliable* case, *supra*, are relied upon as "strikingly similar" (R. 25), and authority for the ultimate findings of the Board in this case (R. 27-28). It was only upon the denial by the Third Circuit of enforcement of the Board's Order in that case that the Board has suddenly found it distinguishable in fact. In any case, no distinction in fact suggested by the Board or by the Second Circuit bears in any way upon the argument made here that no discrimination as required by the Act, namely, "to encourage or discourage Union membership", has been proved.

In another case which involved an interpretation of Section 8 (a) (3), the Circuit Court of Appeals for the Eighth Circuit had to deal with substantially similar questions to those involved herein. In that case, the Board had found the employer guilty of violating Section 8 (a) (3) in that he encouraged membership in one Union and discouraged it in another. The facts were as follows: the employer had a collective bargaining contract with the International

⁷ The Board's analysis is carried to its "dryly logical extreme" when benefits voluntarily conferred by this employer are considered. As a matter of good personnel relations with its permanent employees, this employer voluntarily credited them with an extra week of vacation pay. Is it to be penalized for this gesture by now being required to extend such payment to persons whom it did not contemplate in making its original offer?

Union of Operating Engineers, Hoisting and Portable, Local No. 101 of Greater Kansas City and Vicinity, A. F. of L. The National Union's charter provided for the issuance of sub-charters to local Unions for apprentice units and such a unit was formed at the site of one of the employer's construction projects. The apprentice unit was designated Local No. 101-B. The Union's seniority rule in effect at the time provided that, if an employee was a member of the apprentice unit for five years and qualified on the various types of equipment, he was then eligible for membership in the parent Union. However, in the event of lay-offs, all members of the parent Union were to have a preference to apprentices who must all be laid off before any member of the parent Union was discharged, regardless of the status of seniority on a particular project. The employer was compelled to reduce the size of his working force on a project and, therefore, according to the seniority rule, a member of the apprentice unit was discharged. This was made the basis for an unfair labor practice charge against the employer in that he was encouraging membership in Local No. 101 and discouraging membership in Local No. 101-B by his actions. The Court found that, under these circumstances, the employer was not guilty of violating Section 8 (a) (3). It stated at page 705, *supra*:

“It must be borne in mind that he [the discharged employee] was not eligible to membership in Local 101 and he actively sought such membership prior to the instant here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Picard [the discharged employee] could scarcely have been encouraged to become a journeyman member of respondent union become

under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed, at least by an act of the respondent company. It could scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing." *N. L. R. B. v. Del E. Webb Construction Co. et al.* (C. C. A. 8, 1952), 196 F. 2d 702."

The Court then goes on to cite the *Reliable* case, *supra*, with approval.

In still another case involving similar questions regarding the interpretation of Section 8 (a) (3), the Court held that an employer cannot be found guilty of encouraging or discouraging Union membership, unless his acts were done for that purpose and that such acts had that effect. *National Labor Relations Board v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, etc., Local Union No. 41, A. F. of L.* (C. C. A. 8, 1952), 196 F. 2d 1 (1952), certiorari applied for and granted, No. 301, October Term 1952. In that case, the employer kept a seniority list from which men were assigned their work. One of the employees failed to pay his Union dues and, according to a By-Law in the Union Charter, thereby forfeited his standing on the seniority list. Accordingly, the Union requested the employer to reduce this man's seniority from eighteenth on the list to the bottom, or fifty-fourth position, as a result of which the employee lost work on several occasions and instituted this charge. The Court stated at page 3, *supra*:

"The question confronting us, therefore, is whether there is substantial evidence to support the finding that such discrimination would, or did, 'encourage or discourage membership in any labor organization' in violation of Section 8 (a) (3) of

the Act. *Discrimination alone is not sufficient.*"
(Italics supplied.)

In the instant case, the Board seeks to charge this Petitioner with an unfair labor practice under Section 8 (3), now Section 8 (a) (3), for *discrimination alone*. The Second Circuit, in affirming the Board's ruling in the case at bar, made no finding that there was substantial evidence to support the claim that the discrimination involved herein would, or did, "encourage or discourage membership in any labor organization" in violation of Section 8 (a) (3) of the Act. The words of the statute itself certainly do not make mere discrimination alone a violation. The interpretation of the Third Circuit in the *Reliable* case and of the Eighth Circuit in the *Del E. Webb* case and the *Teamsters* case, *supra*, properly construed Section 8 (a) (3) to require more than mere discrimination to support a finding of an unfair labor practice under that section. All three cases indicate beyond any question of a doubt that *mere disparate treatment alone* is not sufficient to support an alleged violation of Section 8 (a) (3).

The Eighth Circuit continued its analysis in the *Teamsters* case, citing and following the *Reliable* case, *supra*, and concluded as follows:

"Having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] would, or did, encourage or discourage membership in any labor organization * * *", *supra*, page 4.

The Court's analysis stated that theoretically discrimination can be a violation of Section 8 (a) (3) but only when there is *substantial evidence* to indicate that the act of dis-

crimination was done with the intention of encouraging or discouraging Union membership and that it would, or did have such effect. When neither purpose nor effect can be proven, disparate treatment alone is not a violation of Section 8 (a) (3) and certainly nothing more than disparate treatment has been shown in this case.

C. The Board failed to prove that petitioner encouraged Union membership within the meaning of the Act.

Petitioner is charged with encouraging membership in a labor organization to which is was, and is, fundamentally and bitterly opposed (R. 112-113) and which organization has indicated clearly that it would not accept such membership in any event (R. 105-109). It is accused of encouraging employees whose affiliation in the particular Union has never been of the least concern to Petitioner. As a matter of fact, it is clear from the circumstances of this case that such affiliation by any Union employee would have represented a financial loss to Petitioner since he would thereby have been brought under the contract.

It is Petitioner's contention that this anomaly is the result of an erroneous interpretation by the Board of Section 8 (3). As outlined in Paragraph A, *supra*, of this brief, the Board contends as a legal proposition that once it has proved disparate treatment as between the Union and non-Union employees, it has proved all that is required of Section 8 (3). But it is clear that the unfair labor practice defined in that section is "to encourage or discourage membership in any labor organization", and the words "by discrimination" are only qualifying words limiting the method by which encouragement or discouragement is achieved.

Of course, the distinction between "discrimination" and "encouragement and discouragement" is ordinarily of

slight significance, since encouragement or discouragement of Union membership may be assumed in the normal discrimination case. The phraseology of Section 8 (3) becomes decisive only in the unusual situation, such as is presented here, in which discrimination is concededly not identified with any attempt by the employer to influence or coerce his employees in their selection of a bargaining representative.⁸

Even the Second Circuit has recognized the distinction between discrimination alone and discrimination "to encourage or discourage Union membership". In *NLRB v. Child's Co. et al.* (C. C. A. 2, 1952), 195 F. 2d 617, that Court stated:

"... the statute only prevents discrimination in regard to hire where the discrimination encourages or discourages membership in labor organizations. 29 U. S. C. A. Section 158 (a) (3)."

The requirements of proof become somewhat clearer when we shift the analytic emphasis to "encouragement or discouragement". The Board must prove that an employer intended to encourage or discourage union membership and that his action had that effect. In the normal case, these elements of purpose and effect run together in a single pattern of discriminatory activity in which the individual requirements of proof are obscured. In the unusual case, such as the one at hand, it is vital that they be precipitated out of the compound and separately applied.

The Board disputes that these requirements of proof exist independently, but this cannot be questioned in view

⁸ *NLRB v. Link Belt Co.*, 311 U. S. 584 (1941), cited by the Board (Board's Brief in the C. C. A., p. 11), makes the point that the "normal" case is to be distinguished from the "rare" case; that is precisely the point which Petitioner is attempting to establish here in the interpretation of Section 8(3).

of the almost unanimous concurrence of the Circuit Courts of Appeals. The following excerpts illustrate beyond any question of a doubt the necessity of sustaining the burden of proof that the discrimination alleged had both the purpose and the effect of encouraging or discouraging union membership.

"SECTION 8 (3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." *NLRB v. Air Associates*, (C. C. A. 2), 121 F. 2d 586, 592 (1941).

"To make out a case under Section 8 (3), it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review." *Stonewall Cotton Mills v. NLRB*, (C. C. A. 5), 129 F. 2d 629, 632 (1942), cert. den. 317 U. S. 667 (1942).

"It is perfectly clear that, in the discharge and refusal to reemploy, there was no intent to discourage membership in any labor organization, within the meaning of Section 8 (3) of the Act." *NLRB v. Draper Corp.* (C. C. A. 4), 145 F. 2d 199, 202 (1944).

"Under this section of the Act [Section 8(3)] to constitute the unfair labor practice of discrimination, the discrimination in regard to hire and tenure must have the purpose 'to encourage or discourage membership in any labor organization'." *Western Cartridge Co. v. NLRB*, (C. C. A. 7), 139 F. 2d 855, 858 (1943).

"The burden * * * was upon the Board to prove affirmatively and by substantial evidence that Bullard and Lingle were discharged because of union membership and activities and for the purpose of discouraging membership in the union." *NLRB v. Reynolds International Pen Co.*, (C. C. A. 7), 162 F. 2d 680, 690 (1947).

"The prohibition of Section 8 (3), by its plain terms, extends to any discriminatory discharge the purpose and manifest effect of which is to discourage employee membership in a labor organization." *Wells, Inc. v. NLRB*, (C. C. A. 9), 162 F. 2d 457, 459-460 (1947).

"It may be taken as settled that the right of an employer to discharge an employee, for cause or without cause, is the same whether the employee is or is not a member of the union. An employer may not, however, discharge or discriminate between employees, whether or not members of a union, for the purpose of discouraging membership in, or action on behalf of, a union." *NLRB v. Robbins Tire & Rubber Co.*, (C. C. A. 5), 161 F. 2d 798, 801 (1947).

It is therefore well settled that these requirements do exist and the question then becomes how each is to be applied to a particular situation and what type of evidence will satisfy such requirements and whether that evidence appears on the record.

1. The Necessity of Proving Purpose.

The Board contends that since Petitioner "discriminated against employees because they were not Union members" (Board's Brief in the C. C. A., p. 10), its intent to encourage membership is automatically established. Such a statement in this case, in the light of the unique circumstances involved, is somewhat flippant and misleading. Petitioner did not discriminate against Loner *because* he was not a Union member. Assuming that Petitioner did discriminate, it did so because, in its sound business judgment, it felt that Loner was not entitled to the particular benefits involved, either contractually or otherwise. That is quite different from the cases cited by the Board in their

brief before the Circuit Court of Appeals⁹ in which the employer made a deliberate selection in favor of a particular Union which effectively bound his employees to become members of that Union or to lose their jobs. Union membership was the specific center of a controversy and the unilateral action on the part of the employer in those cases determined the membership of his employees. Here, Union membership, as such, is not even remotely involved.

Similarly, the Board's argument that such proof of intent goes merely to the question of whether or not discrimination occurred (Board's Brief in the C. C. A., p. 9), is completely inconsistent with the cases cited above in which the Courts specify that it is "intent to encourage or discourage Union membership" to which they refer. The notion that this is merely a method of establishing "good faith" on the part of an employer in mitigation of the remedy imposed against him (Board's Brief in the C. C. A., p. 10), is completely unsupported by the language of the Act. If the Act meant to provide for "good faith", it would have contained a good faith provision. Cf. Fair Labor Standards Act, 29 U. S. C. A. Section 216.

The Board, like any other litigant, is entitled to rely on objective facts to support an inference that a particular intent existed. But the presumption thus created is not an absolute irrefutable presumption. It exists only in the *absence* of evidence to the contrary. In this case, Petitioner attempted to introduce that evidence—that Loner's membership in the Union had been sought and rejected, and that, under the circumstance, the employer's action could not have intended to encourage a result which all parties knew to be impossible (R. 105-109, 117-120),

⁹ *NLRB v. Don Juan* (C. C. A. 2, 1950), 185 F. 2d 393; *NLRB v. Gluek Brewing Co.* (C. C. A. 8, 1944), 144 F. 2d 847; *Allis-Chalmers Mfg. Co. v. NLRB* (C. C. A. 7, 1947), 162 F. 2d 435.

but that evidence was rejected by the Trial Examiner. The Board's duty to come forward with the controverted evidence is apparent; in place of such evidence, it makes the suggestion, unsupported by any evidence whatsoever, that membership in the Union might be achieved "by any one of a number of steps, from bribery to legal action" (Board's Brief in the C. C. A., p. 23, fn. 23).

The purpose of the employer and the effect of his actions have been essential requirements of proof of Section 8 (3) violations from the very outset. The necessity of proving purpose was established by the Supreme Court in the very first case which came before it concerning the Act, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 1937. In that case, the Court stated:

"The employer may not, under cover of that right [to discharge for cause or according to his whim], intimidate or coerce its employees with respect to their self-organization, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion. *The true purpose is the object of investigation with full opportunity to show the facts.*" *Supra* at 45-6 (Italics supplied).

The rationale of requiring proof of motive is stated by Professor Cox in his article, "*Some Aspects of the Labor-Management Relations Act of 1947*", 61 Harv. L. Rev. 1, 274, as follows:

"The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire

to protect a recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8 (3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a Union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful."

In other words, an employer might, for business reasons, make a plant rule which differentiates between Union and non-Union employees (conceivably based on a Union apprentice training as in the *Del E. Webb* case, *supra*). The discriminatory rule, as applied, might possibly have the effect of encouraging or discouraging Union membership, but unless the employer's conduct is designed to encourage or discourage Union membership, no unfair labor practice is committed. Any other interpretation would place the employer in the position of having to defend every action which might, in some inadvertent way, have influenced Union membership, even though the conduct was not motivated by any Union considerations.

The unfair labor practice sections of the Act are, in a sense, penal sections; violation of the rules they establish may impose serious financial loss upon the employer and subject him to suffer serious restrictions in his future relationships with his employees. The imposition of such penalties should certainly require a showing of intent to violate the Act and to obtain a result prohibited by it. The words of the statute itself lend credence to this argument. On the evidence put forth in this case, it cannot seriously be said that Petitioner intended to encourage a result which it knew could not occur and which, if it ever did occur, would

not only have been a disadvantage to the employer, but would have also involved certain financial loss.

Finally, the cases cited by the Board for the proposition that the purpose of the employer is immaterial are not on point. *Republic Aviation Corp. v. NLRB*, 324 U. S. 793 (1945) does not deal with requirements of proof; it merely deals with the right of the Board to infer that such requirements have been proved in the absence of evidence to the contrary.¹⁰ In his analysis of the *Republic Aviation* case, Professor Cox has stated:

“In the Supreme Court, the company did not claim that it could make such non-discriminatory rules as it thought fit the conduct of its business; its argument was that the finding should be set aside because it was based on the Board’s knowledge of industrial relations instead of on evidence in the record. The Court held, however, that under normal circumstances, the Board’s conclusion was a permissible inference from the mere existence of the regulation and that, since the company had failed to take advantage of its opportunity to show that there were exceptional circumstances, the Board’s order should be enforced.” Cox, *Some Aspects of the National Labor Relations Act of 1947*, 61 Harv. L. Rev. 1, 41.

Herein lies a central issue in this case. The Board’s findings are based on inferences drawn from objective facts. Such inferences may normally be made by any litigant.

¹⁰ In that case, a company rule, prohibiting solicitation of Union membership on company property, was declared by the Board to be an unfair labor practice and a discharge in consequence unfairly discriminatory. *Republic Aviation* has had a chequered career even in its properly limited sense. The Taft-Hartley Act purported to override it. (*Conf. Rep. H. R. 3020, 80th Cong., 1st Sess.*) and *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1950) and *NLRB v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1950) strike at some of its basic procedural assumptions.

However, where concrete facts can be shown to refute these inferences, the Court has a duty to receive such evidence and weigh it against the inferences. In this case, Petitioner attempted to introduce such evidence (that Loner had sought membership in the Union and had been rejected; that Loner could not possibly become a member of the Union under its Charter as it existed at that time; that the employer stood to lose financially if Loner did join the Union, etc.) and these offers of evidence were rejected by the Trial Examiner as irrelevant and immaterial (R. 105-109, 117-120).

Thus, we have a decision unsupported by any substantial evidence in the record whatsoever, based on inferences alone, gleaned from a hearing in which the Trial Examiner prevented Petitioner from offering any evidence to rebut these inferences.

2. The Board failed to prove by substantial evidence on the record considered as a whole that the conduct complained of encouraged Union membership.

The scheme of the original Wagner Act was somewhat unique in that it invested the Board with the functions of prosecutor and judge. Protests against "shocking injustices"¹¹ and intimation of judicial abdication¹² stimulated pressure for Legislative relief from the administrative excesses of the Board. The legislative history of the Taft-Hartley Act indicates clearly that findings of fact by the Board must be supported by *substantial evidence on the record considered as a whole*. Originally, the bill as reported to the House, provided that "the findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the Court either (1) that the

¹¹ *Wilson & Co. v. NLRB* (C. C. A., 7) 126 F. 2d 114, 117.

¹² *NLRB v. Standard Oil Co.* (C. C. A., 2) 138 F. 2d 885, 887.

findings of fact are against the manifest weight of the evidence or (2) the findings of fact are not supported by substantial evidence." *H. R. 3020 80th Cong. 1st Sess.* Section 10 (4), reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, page 71. But, as the Senate Committee Report states, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails." *S. Rept. No. 105 80th Cong. 1st Sess.* 26-27, reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, pages 432-433. Certainly substantial evidence requires more than mere inferences which can be rebutted by concrete facts, especially where the Trial Examiner refuses to allow such facts to be offered in evidence. (R. 105-109).

This Court recently had occasion to inquire into the background of the substantial evidence doctrine as applied by Appellate Courts to Labor Board decisions, *Universal Camera Corp. v. NLRB*, 340 U. S. 474. In that case, this Court stated

"the substantiality of evidence must take into account whatever in the record fairly detracts from its weight" (*supra*, p. 488).

The Court continue its analysis of the requirements of substantial evidence as follows:

"We conclude therefore that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps

within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence, or both" (*supra*, p. 490).

In other words, the Board cannot substitute its alleged expertness in industrial relations as the basis for its findings, but must instead support its decision as any court must by substantial evidence *in the record*.¹³ The record in this case is notable for its complete absence of evidence to support the allegation that Petitioner "encouraged" Union membership. Instead, the record merely discloses admittedly disparate treatment, from which objective fact the Board infers the conclusion that such disparity was motivated by a desire to "encourage" Union membership, in spite of the concrete facts offered to rebut the inferences to the effect that "encouragement" was impossible; that the employer would suffer immediate financial loss if his non-Union employees became members of the Union; the employer's long background of at arms relations with the Union; the complaining employee's prior application for membership in the Union which was rejected; the Union's rules of admission which rendered the complaining employee ineligible for membership in the Union, etc.

¹³ In this same vein, see *NLRB v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1950).

Thus far, we have shown the employer's complete lack of any motive for encouraging Union membership. We have also indicated the practical impossibility of achieving the prohibited end result of such encouragement due to the Union's restricted membership rules. We look now to the requirement established in prior cases and inherent in the language of the statute itself that the conduct complained of has the prohibited result of actually encouraging Union membership.

3. The Necessity of Proving Effect.

To state that Section 8 (a) (3), or its predecessor, 8 (3), do not require independent proof that encouragement of Union membership actually occurred, is to state that a statute describing "X" as a crime does not require that the occurrence of "X" be proved. Nevertheless, the Board contends that so long as a "necessary tendency" toward encouragement may be inferred, a violation of the Act has occurred although encouragement, as such, may not have occurred.

Again, as with the case of intent above, the Board is speaking the language of evidence, not of statutory interpretation. It may be true that where a "necessary tendency" may be inferred from the underlying facts, the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually proving that a certain person or persons were actually encouraged. See *NLRB v. Engelhorn & Sons* (C. C. A. 3, 1943), 134 Fed. 2d, 553, 557. But where it can be shown that, under all the circumstances, encouragement of Union membership is a logical absurdity, all of the "necessary tendency" and "natural and probable effect" (R. 29) in the world cannot suffice to establish such encouragement

as a finding of fact. As the Court in the *Reliable* case, *supra*, stated:

"It would be necessary for us to completely close our eyes to the admitted facts in order to accept the Board's statement that the inevitable effect of the back wage payment was to encourage union membership because we know that membership in the union for non-union workmen was a practical impossibility" *Id.*, at page 552.

This situation may be compared with a similar one presented to the Second Circuit in *N. L. R. B. v. Air Associates* (C. C. A. 2, 1941), 120 Fed. 2d, 586. In that case an employer was charged with discriminately discharging two employees who were not union members. The Board argued that such discharges were made in order to create resentment against the union. The Court stated that it was impossible to infer from this alone that the discouragement of union membership had occurred; The Court stated:

"But we can discover no satisfactory explanation by the Board which would permit either a finding that the unlawful purpose had the effect required by the act or findings from which such an effect might reasonably be inferred." *supra*, at page 592.

The Second Circuit later referred to the Board's finding in *Air Associates* as creating a legal absurdity in *Perkins v. Endicott-Johnson Corporation* (C. C. A. 2, 1941), 128 Fed. 2d, 208 at pages 221-2, as follows:

" * * * there was no evidence and no finding from which an inference could possibly be drawn that the discharge of employees (not known by the employer to be union members) in order to reinstate union employees, previously discharged, could conceivably discourage membership in a union, in violation of Sec-

tion 8 (3) of the National Labor Relations Act, 29 U. S. C. A., Section 158 (3)."

In the past the Courts have consistently sought to analyze the actual effect an employer's action may have upon union membership. Thus in *Quaker City Oil Refining Corporation v. NLRB*, 119 Fed. 2d, 631 (1941), the Court stated as follows:

"It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the union." *supra*, at page 633.

This language was approved and applied in *N. L. R. B. v. Public Service Transport*, 177 F. 2d 119 (1949).

Petitioner offered to prove that Loner had applied for union membership long before the question of retroactive pay arose, had been unsuccessful in achieving that goal and was, in fact, ineligible for such membership (R. 105-109, 117-120). Assuming this to be true, the Board is in the position of accusing Petitioner of encouragement, where no encouragement was necessary and of encouraging a result which, upon the offered evidence, was impossible of achievement. To find the unfair labor practice of encouragement under such circumstances would be a complete *non sequitur*.

II.

Legislative History.

The legislative history of the Labor Management Relations Act of 1947 adds weight to the interpretation for which Petitioner contends. We are dealing in this case with the

National Labor Relations Act of 1935, an Act notoriously unsolicitous of the rights of non-Union employees. See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U. S. 355 (1949); *Congressional Record*, 80th Cong., First Sess., 93 Cong. Rec. 3471 to 3475; 93 Cong. Rec. 3950, *et. seq.* The Labor Management Relations Act of 1947 had as one of its main objectives the protection of such employees (see Sections 8(a)(3); 8(b)(2); 7; see also *Report of Senate Committee on Labor and Public Welfare*. Sen. Rep. No. 105, 80th Cong., First Sess. (1947), pages 6-7) and among its amendments was a provision to cover the precise situation existing in the case at bar. In Section 8(a)(3) of that Act, Congress provided as follows:

“••• no employer shall justify any discrimination against an employee for non-membership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.”

Surely if the reading of the National Labor Relations Act of 1935, for which the Board here contends, were correct, then the new provision would have been entirely unnecessary because discrimination in favor of union members where membership in the union was closed would have been *per se* an unfair labor practice under the former Act. It is difficult to believe that such an extensive change could have been merely declaratory of existing law and it impels one to the conclusion that the National Labor Relations Act of 1935 left open the situation here complained of.

III.

An illegal Union security clause does not void an entire contract which also contains savings and separability clauses.

The Order which the Board sought to enforce in this case originally required the Union and Petitioner to discontinue all relations between them and desist from performing or giving effect to the contract formally executed by the parties on October 25, 1948. The Second Circuit modified that Order in so far as it forbade any contractual relations between the parties but nevertheless permitted a provision to be entered ordering Petitioner to:

"1. Cease and desist from:

• • • • •

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity;

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended." (R. 129-130).

The Board had held the 1948 contract void on the grounds that it contained an illegal union security clause without having fulfilled the preliminary technical requirement of holding an election as formally required under Section 8 (a) (2). Thus, the failure of Petitioner and the Union to observe a procedure so perfunctory that even its

former proponents have since advocated its elimination from the Act¹⁴ has resulted in the parties being deprived of all rights they had acquired under that contract. The so-called Union shop election, concededly omitted by Petitioner and the Union in reaching their 1948 contract, was done away with in October 1951 as expensive, cumbersome and meaningless and a new procedure substituted which is not relevant here.

Nevertheless, the Board insists upon the technical applicability of Section 8 (a) (2), a section designed to reach domination of and connivance with labor organizations by an employer seeking to bore from within, a situation not even remotely involved in this case.

The contract in question was precisely the same contract which this Court had occasioned to analyze in its recent decision in *NLRB v. Rockaway News Supply Co., Inc.*, No. 318, October Term, 1952, decided March 9, 1953. That contract was negotiated by the same Union and the same Newsdealers Association as were involved in the *Rockaway News Supply* case, *supra*. The parties were represented by the same counsel. The contract contained the same savings and separability clauses. Those clauses read as follows:

“To the best knowledge and belief of the parties, this contract now contains no provision which is contrary to Federal or State law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with Federal or State law or regulation, then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provi-

¹⁴ 82d. Cong., 1st Sess. Sen. Rep. No. 646; House Rep. No. 182; P. P. L. 189.

sions of this agreement shall, nevertheless, remain in full force and effect." (R. 93).

As this Court so cogently stated in the *Rockaway News Supply* case, *supra*, at pages 6-8:

"The second hurdle in the way of the Board's position [in attempting to void the entire contract because of the illegal union security clause] is that it ignores the saving and separability clauses of the contract itself * * * The features to which the Board rightfully objects, not only may be severed, but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; * * *

"The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it * * * The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain where the excess may be severed and separately condemned as it can here."

Exactly the same facts, the same considerations and the same contract are involved in this case and Petitioner submits that that portion of the Order of the Court of Appeals for the Second Circuit, which orders Petitioner to cease and desist from performing or giving effect to its contract with the Union, should be overruled.

IV.

The Board's order is not entitled to enforcement as to employees who are not named in the complaint and who did not file charges before the statute of limitation expired.

Only one of the employees filed a charge against Petitioner. Nevertheless, Petitioner found itself, nearly two years later, faced with a complaint extending that charge to include, without further designation, all of Petitioner's non-Union employees. Petitioner contends that this is not authorized by the Act. The Board blandly asks why Petitioner should complain of the inclusion of all non-Union employees when such inclusion occasioned no "hardship" or "surprise" to it. In the first place, Petitioner has the right of any person or corporation to be required to defend only those charges which are actually brought against it. Nothing in the Act empowers the Board to solicit litigation on the part of individuals who, for whatever reason, have not themselves instituted proceedings, nor may the Board commence proceedings on its own initiative. *Consumers Power Co. v. NLRB* (C. C. A., 6, 1940), 113 F. 2d. 38. See also *NLRB v. Local 57, International Union of Operating Engineers, et al.* (C. C. A., 1), decided February 3, 1953, reported in C. C. H. 22 Labor Cases ¶67, 384. In that case, an unfair labor practice charge was filed by an employee against a Union. The Board made its findings and held both the Union and the employer guilty of unfair labor practices despite the fact that the complaining employee had never named the employer in the charge. The Court stated:

“ * * * *The Board lacks initiatory power under the Act.* Section 10(c) provides that an unfair labor practice may be found and an Order may be issued only against ‘any person named in the complaint’. See *Gen. Elec. X-ray Corp.*, 76 NLRB 64 (1948). Section 10(b) allows a complaint to be issued only against a person charged with an unfair labor practice. Thus, under this statutory scheme, the choice of respondent or respondents lies with the person aggrieved and an employee who is illegally discriminated against by joint action of the Union and the employer may name as respondent either the Union or the employer or both. It seems to us that the Board lacks statutory authority to add an employer as a respondent where a charge like this is made against the Union and its officers.” (Emphasis supplied).¹⁵

Similarly, it would seem that the Board has no authority to initiate charges on behalf of unnamed persons who have not themselves seen fit to file such charges. Although the Board may enlarge upon unfair labor practices set out in the original charge, that is quite different from what the Board attempts to do here in actually initiating charges on behalf of employees who did not themselves either institute them, or indicate on the Record that they wished such charges brought in their behalf. In the second place, a class suit

¹⁵ See *Marine Engineers' Beneficial Association, No. 13 v. NLRB, International Longshoremen's Association, A. F. of L., et al.* (C. C. A. 3, 1953) reported at C. C. H. 23 Labor Cases ¶67, 447, which holds that the Board also lacks the power of withdrawal. In that case, the Board entered into a settlement with the Respondents over the objection of the charging party. The Third Circuit held that the charging party's rights may not be cut off without at least providing them with an opportunity for presenting evidence at a hearing. Certainly, if the charging party is entitled to protection under those circumstances, then, in the circumstances of the instant case, Petitioner should also be entitled to the protection afforded by cross-examination of the charging parties.

of the type which the Board has apparently spun here is a particularized form of action which, if it were to be part of the Board's arsenal, should have been specifically authorized by Congress. (See Federal Rules of Civil Procedure, Section 23.)

Congress indicated its intention to enable employers, after a six month period, to draw the line against potential liability greater than that indicated by the charges as filed and mailed to them. A procedure by which a single charge filed by a single employee might serve as a bridge for countless other claims filed two or three years later would, in a vital respect, undermine Congressional intention in this regard and completely vitiate the purpose of Section 10(b). Finally, the nature of the testimony, which Petitioner sought to adduce and which the Third Circuit treated as highly relevant in the *Reliable* case, *supra*, was personal testimony of a sort which would certainly differ as between various non-Union employees. Petitioner, having raised the issue that, under the circumstances of this case, Union membership was and is an illusory factor, the testimony of each such claimant is required. The burden was not Petitioner's; the Board's presumption that Petitioner's acts "tended to" encourage union membership having been met, the burden was upon the Board to come forward with substantiating evidence. This is precisely what the Board attempts to do by unsupported inferences when it states in its brief that "frustrated applicants" for Union membership "might seek to break down membership barriers by any one of a number of steps ranging from bribery to legal action" (Board's Brief in the C. C. A., p. 23, fn. 23). Surely such proof, if it existed, would bring into controversy the testimony of many employees, which testimony Petitioner would have the right to cross examine. Thus, it is not true

that the situation of all employees is "identical to that of the employee who filed the charge" and the failure on the part of the Board to define, name or produce those employees renders its Order unenforceable as to them.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the Order of the Board denied enforcement.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

JULIUS KASS,
MAURICE H. GOETZ,
of Counsel.

April 1953.

Appendix.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a con-

dition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

• • • • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic

dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

.

Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

LE COPY

No. 7.

Office - Supreme Court, U. S.
FILED

OCT 29 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

GAYNOR NEWS COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

BANDLER, HAAS & KASS,
Attorneys for Petitioner,
11 Broadway,
New York 4, N. Y.

JULIUS KASS,
MAURICE H. GOETZ,
MARTIN P. DILLON,
Of Counsel.

BLEED THROUGH- POOR COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953.

GAYNOR NEWS COMPANY, INC.,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.*

SUPPLEMENTAL BRIEF FOR PETITIONER.

On May 25, 1953, the Court ordered this case restored to the docket for reargument, 345 U. S. 962. Gaynor News Company, Inc. submits this supplemental brief in reply to the one filed by the Board, for consideration on the reargument.

I.

Discrimination alone is not sufficient to constitute a violation of Section 8(a)(3), but it must be discrimination "... to encourage or discourage membership in any labor organization."

A. The Board concedes that there was no purpose or motive "to encourage" union membership in this case.

The Board has now apparently shifted its position and admits that the Petitioner's conduct was not motivated, nor did it have as its purpose, the "encouragement" of

membership in any labor organization (Board's supplemental brief, p. 4). On page 12 of the supplemental brief, the Board states:

"We therefore grant that the company's purpose was to save money rather than to encourage Union membership as such; . . ."

However, the Board's position appears to be that purpose and motive are not material, in spite of the overwhelming precedents to the contrary (see our original brief in this Court, pages 22-24). The element of purpose has always been considered so integral a part of the unfair labor practice prohibited by Section 8(a) (3) that the Board's Trial Examiners as recently as July, 1953 still required a showing of unlawful purpose before sustaining an 8(a) (3) violation.¹ Evidently the Board recognizes at this late date

¹ *In the Matter of Wagner Electric Corp. v. Local 23, American Federation of Technical Engineers, A. F. L.*, 105 NLRB 3, a similar charge arose in which respondent was accused of "discouraging" union membership by disparate treatment. There the discrimination was admitted by respondent as it is in the present case. However, the motives which dictated the discrimination were in dispute. The Trial Examiner, in analyzing these circumstances, stated as follows:

"The question is whether Respondent in determining its policy, was *motivated* by a desire to discriminate against Union members in favor of its non-organized employees. . . . *Disparity of treatment, there was; but disparity of treatment is not the equivalent of discrimination.* . . . There is nothing here to show that this disparate treatment was caused by anything else than respondent's own conception of sound business policy." (Emphasis supplied.)

In another case decided in July, 1953, in which a similar situation arose, the Trial Examiner also indicated that in his opinion illegal purpose was an essential ingredient required to constitute a Section 8(a) (3) violation. *Cities Service Refining Corp. v. Office Employees International Union, Local 87, A. F. L.*, 105 NLRB 124. There, too, disparity was admitted but the motivation for the disparity was disputed. The Trial Examiner stated as follows:

"It is *only* when the grant to the one, and not to the other, is *motivated* by a *purpose* unlawful under the Act, that the

its inability to establish illegal purpose and therefore concedes its non-existence. However, in its original brief before this Court, it stated that purpose or motive must be shown only where the ultimate fact of disparity is in question. It further stated that when discrimination is admitted, motive or purpose is immaterial (Board's original brief, p. 31).

In its brief before the Court of Appeals, the Board expressed the same idea, at page 9, as follows:

"However, the inquiry into the employer's motivation in all of those cases was material only as an aid in determining the ultimate fact admitted here,—that union affiliation, or lack of it, prompted the discrimination. *Because an employer may discriminate for any reason other than union or concerted labor activities, the employer's motivation becomes a critical ancillary issue whenever he contends that his conduct was motivated by factors other than union activity.*" (Emphasis supplied.)

In the instant case, the employer contended again and again that its conduct was motivated by business reasons and not by union activity (R., pp. 61-62, 104, 111-112). Yet these offers of evidence were held to be immaterial by the Board.

In the two recent cases cited in Footnote 1, the discrimination was also admitted, but the Trial Examiners still went on to require a showing of unlawful purpose.

privilege is lost and the disparity becomes illegally discriminatory. *But absent an unlawful purpose, a violation of Section 8(a) (3) may not be concluded from such disparity standing alone.*" (Emphasis supplied.)

The Trial Examiner sought to distinguish this analysis from the *Gaynor* case by stating that the discrimination in the *Gaynor* case was discrimination *per se*. At best this is an artificial distinction since no Court has yet defined the term "discrimination *per se*".

The critical issue to be determined where a Section 8(a) (3) violation is charged is whether "encouragement or discouragement" of membership in any labor organization occurred. It is *encouragement* which is forbidden, not mere discrimination. Discrimination alone is forbidden in other sections of the statute. For example, the second proviso in Section 8(a) (3) states:

"... provided, further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization . . ."

There discrimination, as such, is forbidden. Since an 8(a) (3) violation cannot arise unless the employer's conduct was directed toward encouraging or discouraging union membership, or had that effect, it is difficult to perceive how purpose and effect can be immaterial as claimed by the Board.

B. There is no evidence in the record to sustain the claim that the disparity complained of here would or did have the prohibited result of encouragement.

The original finding of the Board seems to indicate that mere disparity alone, along Union lines, is sufficient to constitute a violation of Section 8(a) (3). The Board stated in its decision:

"While this new evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract, it does not affect the validity of the Trial Examiner's basic conclusion, with which we agree, that the contract affords no defense to the allegation that *the Respondent unlawfully engaged in disparate treatment of employees on the basis of union membership, or lack of it*, as there is nothing in the supplemental agreement of October 9, 1947, which pro-

hibits equal payments to non-union employees" (R., p. 9). (Emphasis supplied.)

The Trial Examiner expressed this identical proposition more cogently by stating:

"The gist of the discrimination with which the Respondent is charged is not for the granting of retroactive payments to the union employees, but rather the *disparate treatment* accorded the non-union men" (R., p. 26). (Emphasis supplied.)

This position completely ignores the crucial issue herein, which is the *encouragement* and not merely the "discrimination in employment" as the Board contends at page 12 of its supplemental brief. The prohibited result is *encouragement* and, if the conduct complained of did not have the prohibited effect of encouragement, then there cannot be a violation of Section 8(a) (3). Yet the entire record fails to reveal an iota of evidence to support the claim that the disparity complained of did, in fact, result in encouragement. The essential element is encouragement and yet the record is barren of any attempt by the Board to prove this basic statutory requirement; and what is worse, all offers of evidence by Petitioner to disprove encouragement were rejected (R., pp. 105-109, 117-120).

The Board contends that from mere disparity, it can infer encouragement. However, offers of concrete evidence to rebut this inference were made by Petitioner and rejected by the Trial Examiner who thereupon based his conclusions on the inferences alone (R., pp. 105, 109, 117-120). This is a denial of due process and an attempt by the Board to shift the burden of proof to the Petitioner. Since the prohibited result is "encouragement", it was the Board's duty to introduce evidence that encouragement has,

in fact, occurred. Instead, the only authority for this point consists of its own conclusion that the fact of disparity necessarily tends toward encouragement, thus shifting the burden of proving no encouragement to the Petitioner.

Unless there is evidence in the record to prove the fact of encouragement, the Board's findings must be overruled. The Board may not substitute its own alleged "expertness" for proof (see our original brief in this Court, pages 29-32).

The Board states in its supplemental brief, at page 13, that Section 8(a) (3) prohibits

". . . discrimination which is based upon union membership or activity *and* which results, *in fact*, in encouragement or discouragement of membership."
(Emphasis supplied.)

With this statement, we concur wholeheartedly. But the fact of encouragement has never been proven in this case and all offers of evidence to the contrary were rejected (R., pp. 105-109, 117-120). The anachronism of finding the Petitioner guilty of encouraging a result, without any proof that the conduct complained of accomplished that result, is further compounded by the fact that the prohibited result was impossible of accomplishment under the unique circumstances herein.

In another case in which a violation of Section 8(a) (3) was charged on the grounds of disparate treatment, the Court held that, in addition to discrimination, there must also be sufficient evidence to prove the facts of encouragement or discouragement to sustain the Board's order. *NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 41, A. F. L.* (C. C. A. 8, 1952), 196 F. 2d 1 (certiorari applied for and granted, No. 301, October Term 1952, pend-

ing reargument as No. 6, October Term 1953). After concluding that the discrimination practiced did not "encourage or discourage membership in any labor organization", the Court stated, at page 4, as follows:

"Having considered the record as a whole, we can find no substantial evidence to support the conclusion that the discrimination in regard to the tenure or condition of employment of Boston [the employee] did or would encourage or discourage membership in any labor organization. The testimony of Boston refutes such a conclusion. Theoretically, such an act might have such an effect. But in this case we can find no substantial evidence that it did or would have such effect. 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' [Citations] It must do more than create a suspicion of the existence of a fact to be established . . .".

No act of the employer could have constituted further inducement to union membership since the employees affected had already done everything in their power to obtain such membership, had been rejected, and were, in fact, ineligible under the Union's Constitution (R., pp. 105-109, 118-120).² The end result of encouragement outlawed by Section 8(a) (3) was, in fact, impossible of achievement. The Circuit Court of Appeals for the Eighth Circuit, in dealing with the same type of situation, held that under such circumstances, the employer could not be

² In the Board's supplemental brief, at page 4, footnote 2, they refer to the fact that certain amendments were made in the Union's Constitution which open the door for increased Union membership. Changes in the Union's Constitution referred to in the *Jersey Coast* case took place four years after the events of this case and obviously have no merit in this argument which arose during the lawful closed shop period of the Wagner Act days.

guilty of "encouraging union membership" *NLRB v. Del E. Webb Construction Co., et al*, 196 F. 2d 702 (1952). That Court stated, at page 706, as follows:

"So in the instant case, it being impossible for Pickard to become a member of the Respondent union, nothing that Respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which was impossible for him to join. There can be no violation of this Statute [Section 8(a) (3)] unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization . . . [Citations]."

To epitomize the utter hopelessness of the employer's position in these circumstances, we need merely consider the only other alternative open to the employer; namely, to pay the retroactive wage and vacation benefits to its non-union employees. Such a course of action, under the Board's interpretation, would certainly leave the employer open to the charge that he was *discouraging* union membership. If the non-union employees could obtain all benefits granted the union employees, even though they were not members of the union, surely such conduct by the employer would be "conducive toward" and "have a natural tendency to" discourage union membership. Thus, under the Board's analysis of Section 8(a) (3), an employer straddles the horns of an insoluble dilemma. If he does *not* pay the benefits to his non-union men, he is guilty of encouraging them to join the union; if he *does* pay the benefits, he is guilty of discouraging union membership. Petitioner submits that Congress never intended to place an employer in the throes of such an illogical and paradoxical situation.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the order of the Board denied enforcement.

Respectfully submitted,

BANDLER, HAAS & KASS,
Attorneys for Petitioner.

JULIUS KASS,
MAURICE H. GOETZ,
MARTIN P. DILLON,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings and conclusions	2
1. Petitioner's discriminatory treatment of its non-union employees	3
2. The illegal union security clause in the October 25, 1948, contract	5
3. The validity of the complaint issued by the Board	6
B. The Board's order	7
C. The decision of the court below	8
Argument	10
Conclusion	18
Appendix	19

CITATIONS

Cases:

<i>Allis-Chalmers Mfg. Co. v. National Labor Relations Board</i> , 162 F. 2d 435	11
<i>Amalgamated Utility Workers v. Consolidated Edison Co.</i> , 309 U.S. 261	17
<i>Cathey Lumber Company</i> , 86 NLRB 157, enforced, 185 F. 2d 1021, vacated, 189 F. 2d 428	7, 16, 17
<i>Consumers Power Company v. National Labor Relations Board</i> , 113 F. 2d 38	17
<i>Cusano v. National Labor Relations Board</i> , 190 F. 2d 898	16
<i>General Motors Corp.</i> , 59 NLRB 1143, enforced, 150 F. 2d 201	13
<i>General Pictures Co. v. Electric Co.</i> , 304 U.S. 175	10
<i>Kansas Milling Company v. National Labor Relations Board</i> , 185 F. 2d 413	16
<i>National Labor Relations Board v. J. G. Boswell Company</i> , 136 F. 2d 585	13
<i>National Labor Relations Board v. Bradley Washfountain Company</i> , 192 F. 2d 144	16
<i>National Labor Relations Board v. Brezner Tanning Company</i> , 141 F. 2d 62	13
<i>National Labor Relations Board v. Cities Service Oil Company</i> , 129 F. 2d 933	13

Cases—Continued

	Page
<i>National Labor Relations Board v. Don Juan Co.</i> , 185 F. 2d 393	11
<i>National Labor Relations Board v. Donnelly Garment Company</i> , 330 U.S. 219	13
<i>National Labor Relations Board v. Engelhorn & Sons</i> , 134 F. 2d 553	13
<i>National Labor Relations Board v. Fry Roofing Company</i> , 193 F. 2d 324	11
<i>National Labor Relations Board v. Gluek Brewing Co.</i> , 144 F. 2d 847	11
<i>National Labor Relations Board v. Hudson Motor Car Co.</i> , 128 F. 2d 528	11
<i>National Labor Relations Board v. Indiana & Michigan Electric Co.</i> , 318 U.S. 9	17
<i>National Labor Relations Board v. International Brotherhood, etc., Local 41</i> , 196 F. 2d 1, certiorari granted, No. 301, this Term	14, 15, 16
<i>National Labor Relations Board v. Kingston Cake Co.</i> , 191 F. 2d 563	16
<i>National Labor Relations Board v. Kobritz</i> , 193 F. 2d 8 ..	16
<i>National Labor Relations Board v. Link-Belt Co.</i> , 311 U.S. 584	13
<i>National Labor Relations Board v. Oertel Brewing Co.</i> , 197 F. 2d 59	11
<i>National Labor Relations Board v. Reliable Newspaper Delivery, Inc.</i> , 187 F. 2d 547	9, 14
<i>National Labor Relations Board v. Star Publishing Co.</i> , 97 F. 2d 465	11
<i>National Labor Relations Board v. Vail Manufacturing Co.</i> , 158 F. 2d 664, certiorari denied, 331 U.S. 835 ..	13
<i>National Labor Relations Board v. Walt Disney Productions</i> , 146 F. 2d 44, certiorari denied, 324 U.S. 877 ..	13
<i>National Labor Relations Board v. Del E. Webb Construction Co.</i> , 196 F. 2d 702	15
<i>National Labor Relations Board v. Westex Boot & Shoe Co.</i> , 190 F. 2d 12	16
<i>Radio Officers Union v. National Labor Relations Board</i> , 196 F. 2d 960, certiorari granted, No. 230, this Term ..	16
<i>Republic Aviation Corp. v. National Labor Relations Board</i> , 324 U.S. 793	11, 12
<i>Steele v. Louisville & Nashville R. R. Co.</i> , 323 U.S. 192	14
<i>Stokely Foods, Inc. v. National Labor Relations Board</i> , 193 F. 2d 736	7, 16
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U. S. 474	10
<i>Wallace Corp. v. National Labor Relations Board</i> , 323 U.S. 248	14

III

Statutes:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, <i>et seq.</i>):	
Section 7	19
Section 8 (a) (1)	19
Section 8 (a) (2)	5, 19
Section 8 (a) (3)	2, 19
Section 9 (a)	20
Section 9 (e)	5, 20
Section 10 (a)	21
Section 10 (b)	21
Section 10 (c)	22
Section 10 (e)	22
Fair Labor Standards Act, Sec. 16(b), as amended by the Portal-to-Portal Act of 1947 (61 Stat. 87, 29 U.S.C., 216 (b))	17

Miscellaneous:

H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21	13
--	----

BLEED THROUGH- POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the Court of Appeals (R. 153-160) is reported at 197 F. 2d 719. The findings of fact, conclusions of law, and order of the Board (R. 9-57) are reported at 93 NLRB 299.

JURISDICTION

The decree of the Court of Appeals (R. 161-164) was entered on July 8, 1952. The petition for a writ of certiorari was filed on October 2, 1952. The jurisdiction of this Court is invoked under 28 U.

(1)

S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under Section 8 (a) (3) of the National Labor Relations Act, it is unlawful for an employer "by discrimination in regard to . . . any term or condition of employment to encourage . . . membership in any labor organization." The primary question presented is whether an employer who grants a retroactive wage increase and vacation payments to employees who are union members and withholds such benefits from non-members violates Section 8 (a) (3) in the absence of independent proof that his action was intended to, or did in fact, encourage union membership.

2. Whether, following a charge filed by a single employee alleging that as a non-member of a Union he was denied benefits granted union members only, the Board may properly issue a complaint alleging that the employer had discriminated against the charging employee and all others similarly situated.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 19-23.

STATEMENT

A. The Board's findings and conclusions

The Board held that petitioner violated Section 8 (a) (1), (2), and (3) of the Act by refusing to

accord to its non-union employees certain benefits which it granted to its union employees, and by executing and maintaining an agreement which contained an illegal union-security clause. The essential facts upon which the Board's conclusions rest are not in dispute (R. 99-100, 103), and may be summarized as follows:

1. *Petitioner's discriminatory treatment of its non-union employees*

Petitioner and the Union¹ have had collective bargaining agreements covering delivery department employees² since 1943 (R. 30). On January 2, 1946, petitioner and the Union executed a closed shop contract which embraced members of the Union who were then or would thereafter be employed by petitioner (R. 30, 121-126). Although, under the closed shop clause, petitioner was required to employ only members of the Union, under exceptional circumstances petitioner could and did hire persons who were not union members and who did not thereafter become union members (R. 82-83, 122-123).³ This agreement also provided, *inter alia*, for specified wages and paid vacations based on the number of days worked during the previous year (R. 123-124). The original termination date of the contract, October 16, 1947, was

¹ Newspaper and Mail Deliverers' Union of New York and Vicinity.

² These are the only employees involved in this proceeding.

³ The contract permitted employment of non-union personnel if the Union could not supply labor from its own ranks (R. 122-123).

extended by a supplementary agreement dated August 22, 1946, for a period of one year to October 16, 1948 (R. 118-121).

On October 9, 1947, petitioner and the Union executed a second supplementary agreement which provided, *inter alia*, that in the event the parties negotiated a new contract, the wage rates set therein would be applicable retroactively for three months in lieu of the wages provided in the old contract (R. 128-129). On October 25, 1948, petitioner and the Union entered into a new agreement, effective that day, which provided, *inter alia*, for increased wage and vacation benefits (R. 114-117).

As provided in the supplementary agreement of October 9, 1947, petitioner was obligated to apply the wage increase of the new agreement retroactively through the last three months of the old agreement. Hence, in November, 1948, petitioner paid *to its union employees only* a sum of money constituting the difference between the old and the newly increased wage rates for the three months' period. It failed and refused to pay the same differential to any of its non-union employees (R. 10-12, 32, 99, 103, 83-86).

In addition, petitioner awarded retroactively the increased vacation benefits provided in the contract of October 25, 1948 to union employees only; it failed and refused to make similar payments to any of the non-union employees (R. 10-12, 32-33, 100, 103, 77-83). This action was taken despite the fact that none of the contracts provided for retro-

active application of the new vacation benefits (R. 35-36, 78-79).

Upon these facts the Board concluded that petitioner, by making retroactive wage and vacation benefit payments to union employees because of their membership in the Union while failing and refusing to make such payments to non-union employees because of their lack of membership in the Union, discriminated in regard to the terms and conditions of employment of the non-union employees so as to encourage membership in the Union, thereby violating Section 8 (a) (3) of the Act. The Board concluded further that petitioner, by according union employees preferred treatment, illegally assisted and supported the Union in violation of Section 8 (a) (2) of the Act (R. 40-46, 10-12).

2. The illegal union security clause in the October 25, 1948, contract

The October 25, 1948, contract contained a union security clause which required all new employees hired by petitioner to become members of the Union thirty days following the beginning of their employment (R. 115-116).⁴ The Union had never been authorized in a Board-conducted election pursuant to Sections 9 (e) and 8 (a) (3) to negotiate a union security agreement.⁵ The Board found, on

⁴ This contract was in effect at the time of the hearing in July 1950 (R. 71-72).

⁵ During all times pertinent herein, Sections 8 (a) (3) and 9 (e) of the Act provided that union-security agreements could legally be executed only by unions which had been authorized to do so pursuant to a **Board-conducted election**.

these facts, that by entering into an agreement with the Union on October 25, 1948, which contained an unauthorized union security provision, and by continuing this contract in effect, petitioner had interfered with its employees' right to refrain from union activities, in violation of Section 8 (a) (1). The Board found further that by executing the illegal union security agreement petitioner had lent its assistance and support to the Union in recruiting and maintaining its membership in violation of Section 8 (a) (2) of the Act (R. 40-46, 10, n. 4).

3. The validity of the complaint issued by the Board

The original charge initiating these proceedings, filed and served on February 3, 1949, by Sheldon Loner, one of the non-union employees, alleged that petitioner in violation of Section 8 (a) (1) and (3) had discriminated against Loner in refusing to make his October 1948 wage increase retroactive and to pay him vacation benefits because of his non-membership in the Union (R. 93-94). An amended charge filed by Loner on June 13, 1950, repeated those allegations and also alleged that petitioner had violated Section 8 (a) (1) and (2) by executing on October 25, 1948, a contract containing an illegal union security clause (R. 95-96). The Board's complaint, issued June 13, 1950, repeated the allegations in the amended charge and added the allegation that petitioner had refused to make the retroactive wage and vacation payments

not only to Loner but to all employees similarly situated (R. 97-101). The Board rejected petitioner's contention that under the six month period of limitations contained in Section 10 (b) of the Act, the complaint could properly include only the violations alleged in the original charge, relying on its holding in *Cathey Lumber Co.*, 86 NLRB 157, 162-163,⁶ "that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing and service of such charge" (R. 29).

B. The Board's order

The Board's order (R. 12-15), as enforced by the court below, prohibits petitioner from encouraging membership in any union by discriminating in regard to hire, tenure, terms and conditions of employment. The order also requires petitioner to stop performing or giving effect to its contract of October 25, 1948, with the Union, and to refrain from executing or enforcing any agreement with the Union which contains a union security clause unless such agreement has been authorized as provided by the Act.

Affirmatively, the order requires petitioner to reimburse the non-union employees for any loss of pay which they suffered because of petitioner's discrimination, and to post notices, in the usual

⁶ Enforced, 185 F. 2d 1021 (C. A. 5), vacated on other grounds, 189 F. 2d 428, and see *Stokely Foods, Inc. v. National Labor Relations Board*, 193 F. 2d 736, 737-738 (C. A. 5).

form, stating that it will comply with the Board's order.⁷

C. The decision of the court below

Except for the modification noted (n. 7, this page), the court below enforced the order of the Board (R. 161-164).

1. *The validity of the complaint.* Noting that the complaint expanded upon the charge to include all the non-union employees discriminated against, the court observed that "This addition certainly could not prejudice the employer's preparation of his case or mislead him as to what exactly he was being charged with" (R. 154-155). The court further stated that the allegation in the complaint that this discrimination, characterized in the charge as a violation of Section 8 (a) (1) and (3), also violated Section 8(a) (2), "was only a change in legal theory and not in the nature of the offense charged" (R. 155). With respect to the union security contract, the court held that since the contract was still in force at the time of the amended charge alleging its illegality, "the six months' limitation period of Section 10 (b) had not even begun to operate" (*ibid.*).

2. *The merits.* The granting of benefits to union members and the withholding of benefits from non-

⁷ The order originally entered by the Board also required petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of the employees (R. 14). This portion of the Order was set aside by the court below, one judge dissenting (R. 159-160), and the Board has not sought review of this aspect of the case.

members, the court held, was "discriminatory conduct . . . inherently conducive to increased union membership" in that it increased "the number of workers who would like to join and/or their quantum of desire" (R. 156). Rejecting petitioner's contention that the non-union employees, who were ineligible for membership under the Union's rules, had already tried to join the Union and hence were not "encouraged" to do so by the discrimination against them, the court held that "these rejected applicants have been and will continue to be 'encouraged' by the discriminatory benefits in their desire for membership . . . If and when the barriers are let down, among the new and successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination" (R. 156-157). The court noted that here, unlike *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), the Union "represented the majority of employees and was the exclusive bargaining agent for the plant" so that it could not legally bargain "for special benefits to union members only" (R. 156).

The court also agreed with the Board that the union security contract was palpably invalid because it had not been authorized by the special election then required by the Act (R. 158); petitioner has not sought review of this aspect of the case.

ARGUMENT

1. Petitioner contends that it "did not discriminate against Loner [and the other non-union members] *because* he was not a union member," that "it felt that Loner was not entitled to the particular benefit involved," and that "union membership as such is not even remotely involved" (Pet., p. 23). In thus attacking the concurrent findings of the trial examiner, the Board, and the court below that petitioner discriminated among its employees on the basis of union membership, petitioner raises only an issue of fact which merits no review by this Court. *General Pictures Co. v. Electric Co.*, 304 U. S. 175, 178; *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 491.

2. The holding of the court below that petitioner unlawfully encouraged union membership by withholding wage and vacation benefits from all employees who were not members of the Union is manifestly correct, and, contrary to petitioner's contention, is not in conflict with the decisions of any other Courts of Appeals.

Petitioner, conceding that the granting of favored treatment to union members "ordinarily" results in "encouragement . . . of union membership" (Pet., p. 20), argues that in this case the discrimination was not unlawful because it was not intended to encourage union membership and did not in fact have that result. Contrary to petitioner's contention, however, decisions of this Court and of the Courts of Appeals establish that an employer who discriminates among his em-

ployees on the basis of union membership violates Section 8 (a) (3), notwithstanding the absence of evidence that he intended to, or did in fact, encourage or discourage union membership.

This Court in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 805, held that the employer had discriminatorily discharged certain employees in violation of the Act even though the employer did not intend thereby to discourage union membership. An unbroken line of decisions by the various Courts of Appeals likewise establish that where an employer in fact discriminates on the basis of union membership, the fact that he has no desire or intent to encourage or discourage membership is no defense to his violation of the statute.⁸

In the cases cited by petitioner (Pet., pp. 21-22) inquiry into the employer's motivation was material only as an aid in determining the ultimate fact admitted here,—that union affiliation or lack of it prompted the discrimination. Because an employer may discriminate for any reason other than union or concerted activities, the employer's motive becomes a critical ancillary issue whenever he con-

⁸ See, e.g., *National Labor Relations Board v. Don Juan Co.*, 185 F. 2d 393, 394 (C. A. 2); *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *National Labor Relations Board v. Oertel Brewing Company*, 197 F. 2d 59, 62 (C. A. 6); *National Labor Relations Board v. Fry Roofing Co.*, 193 F. 2d 324, 327 (C. A. 9); *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9); *National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C. A. 8); *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 440 (C. A. 7).

tends that his conduct was motivated by factors other than union activity. In such cases, proof of the employer's motive is necessary to ascertain the real cause of the discrimination,—whether for union activity or some other reason. Once this factual question is resolved, the alleged violation is either established or falls. In the instant case, the fact ordinarily contested is established—petitioner withheld benefits from certain employees *because* they were not union members—and under the authorities cited above, its purpose in so discriminating is immaterial.⁹

Petitioner's contention that proof of actual encouragement is an essential element of the Board's case is likewise foreclosed by this Court's holding in the *Republic Aviation* case, 324 U. S., at 798, 800. This Court there expressly rejected the contention "that there must be evidence before the Board to show that * * * the employers interfered with and discouraged union organization" (p. 798); it held that the required proof "does not go beyond the necessity for the production of evidential facts * * * and compel evidence as to the results which may flow from such facts" (p. 800).

A wealth of court of appeals authority likewise holds that proof of actual encouragement of membership is unnecessary, and that, as the House

⁹ Petitioner, although still denying that it intended to encourage membership in the Union, is not seeking review here of the Board's holding, approved by the court below, that petitioner unlawfully assisted and supported the Union by granting it an unlawful union security clause.

Committee stated in reporting favorably on the bill which became the Wagner Act,

agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which *tends* to "encourage or discourage membership in any labor organization". [H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21, emphasis supplied.] ¹⁰

Moreover, petitioner's suggestion that proof of encouragement of membership should be elicited from each employee denied benefits (Pet., p. 29) is not only contrary to this Court's recognition that employee testimony is by no means a reliable gauge of the effectiveness of an employer's discriminatory conduct (*National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219, 231; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588), but overlooks the fact that petitioner's discriminatory conduct may well have encouraged present union members to retain their membership, and may also have encouraged utter strangers to this proceeding to seek admission to the Union.

¹⁰ See, e.g., *National Labor Relations Board v. Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board v. J. G. Boswell Co.*, 136 F. 2d 585, 595-596 (C. A. 9); *National Labor Relations Board v. Brezner Tanning Co.*, 141 F. 2d 62 (C. A. 1); *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board v. Vail Mfg. Co.*, 158 F. 2d 664, 666-667 (C. A. 7), certiorari denied, 331 U. S. 835; *National Labor Relations Board v. Cities Service Oil Co.*, 129 F. 2d 933, 937 (C. A. 2); *General Motors Corp.*, 59 NLRB 1143, 1145, enforced, 150 F. 2d 201 (C. A. 3).

Petitioner claims conflict between the decision of the court below and decisions of the Courts of Appeals for the Third and Eighth Circuits, including one decision now pending on writ of certiorari ¹¹ (Pet., pp. 6-8, 12-18). Although the decisions cited contain dicta undeniably inconsistent with the approach followed by the court below, analysis reveals that the decisions themselves are distinguishable on their facts.

Although the facts in *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), closely resemble those in the instant case, the significant difference, as the court below observed (R. 155-156), is that in *Reliable* the union did not represent a majority of the employees (187 F. 2d, at 549, 551), and hence, unlike the Union here, was not the statutory collective bargaining representative. Consequently, in *Reliable*, the court could find that the disparate wage payments were required by a valid contract, and hence were not discriminatory within the meaning of the Act. In the instant case, however, the Union as representative of all the employees could not validly contract for benefits to union members only (*Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-204; *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 255; see also, the House Report quoted *supra*, p. 13), and the contract therefore cannot, as in *Reliable*, serve as a

¹¹ *National Labor Relations Board v. International Brotherhood, etc.*, Local 41, 196 F. 2d 1 (C. A. 8), certiorari granted, No. 301, this Term.

defense to the employer's discriminatory wage payments.¹² By finding the employer in *Reliable* innocent of illegal discrimination, the Court of Appeals for the Third Circuit disposed of that case on grounds not here involved. The court's alternative holding in that case that proof of encouragement was lacking was not essential to its decision and hence does not pose a conflict which warrants review of the instant case.

In *National Labor Relations Board v. Del E. Webb Construction Co.*, 196 F. 2d 702 (C. A. 8), the court found that the discharge resulted from the normal application of a seniority rule and not from the employee's non-membership in the union. The *Webb* case thus falls in the category described at pp. 11-12, *supra*, where the primary issue is whether union affiliation or lack of it prompted the discrimination; it is distinguishable here where there is no question that the granting or withholding of benefits turned on an employee's union membership or lack thereof.

Likewise inapposite is *National Labor Relations Board v. International Brotherhood, etc., Local 41*, 196 F. 2d 1 (C. A. 8), certiorari granted, No. 301, this Term. In that case, as well as in the case to

¹² Petitioner, conceding as it must that in this case, unlike *Reliable*, the Union was the statutory bargaining representative of all the employees, states that "it is not clear what the effect of such a distinction might be" (Pet., p. 15). Succinctly stated, the effect of the distinction, under this Court's decisions in the *Steele* and *Wallace* cases, is to stamp the contract on which petitioner now relies as invalid.

be heard as a companion thereto,¹³ the employees discriminated against were members of the Union but were discriminated against because they failed to maintain membership in good standing. The issue in those cases, therefore, is whether the term "membership" in Section 8 (a) (3) is limited to "adhesion to membership" or embraces "membership in good standing." See our petition for certiorari in No. 301, pp. 9-11. In the instant case, in diametric contrast to those cases, the employees were discriminated against because they were not members of the Union. Consequently, the discrimination tended to encourage membership even in the narrow "adhesion" concept applied by the Eighth Circuit, and the issue as to which this Court has granted certiorari is not present here.

3. The holding of the court below that the Board in its complaint is not limited to the unfair labor practices alleged in the charge is in accord with a long line of decisions of the several courts of appeals.¹⁴ No conflict of decisions on this point is claimed and none exists. Petitioner, conceding

¹³ *Radio Officers' Union v. National Labor Relations Board*, 196 F. 2d 960 (C. A. 2), certiorari granted, No. 230, this Term.

¹⁴ See *National Labor Relations Board v. Kobritz*, 193 F. 2d 8, 14-16 (C. A. 1); *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 903-904 (C. A. 3); *National Labor Relations Board v. Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *National Labor Relations Board v. Westex Boot & Shoe Co.*, 190 F. 2d 12, 13-14 (C. A. 5); *Cathey Lumber Co. v. National Labor Relations Board*, 185 F. 2d 1021 (C. A. 5), enforcing 86 NLRB 157, 159-163; *Stokely Foods, Inc. v. National Labor Relations Board*, 193 F. 2d 736, 737-738 (C. A. 5); *National Labor Relations Board v. Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co. v. National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

that the Board has power to "enlarge upon the unfair labor practices set out in the original charge" (Pet., p. 28), contends that this power does not permit the Board to include in the complaint discriminatees who have not themselves invoked the Board's aid in their behalf. Cf. Section 16 (b) of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act of 1947, 61 Stat. 87, 29 U. S. C., 216 (b). This precise contention was rejected in the *Cathey Lumber* case, *supra*, p. 16; moreover, it overlooks the fact that the Board acts in the public interest rather than in vindication of private rights (*Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265-269), and that the purpose of the charge is merely to set "in motion the machinery of an inquiry" (*National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18) and to permit the Board to "enter intelligently upon the exercise of its exploratory powers" (*Consumers Power Co. v. National Labor Relations Board*, 113 F. 2d 38, 42 (C. A. 6)).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

✓ GEORGE J. BOTT,
General Counsel.

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

FREDERICK U. REEL,
Attorney,
National Labor Relations Board.

NOVEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a),

of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based

upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, includ-

ing the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

INDEX

	<i>Page</i>
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	3
Statement	3
A. The Board's findings and conclusions	3
1. Petitioner's discriminatory treatment of its non-union employees	4
2. The illegal union-security clause in the October 25, 1948 contract	6
3. The validity of the complaint issued by the General Counsel	7
B. The Board's order	8
C. The decision of the court below	9
Summary of argument	11
Argument:	
I. By making membership or nonmembership in the union the basis for determining whether an employee would receive additional compensation, petitioner vio- lated Section 8 (a) (3) of the Act which forbids an employer "by discrimination in regard to * * * any term or condition of employment to encourage or dis- courage membership in any labor organization"	15
A. By making retroactive wage and vacation payments to union members only, petitioner engaged in "discrimination" within the meaning of Section (8) (a) (3)	17
B. Petitioner's motive in discriminating among its employees on the basis of union member- ship is immaterial to the question whether the discrimination encouraged union member- ship in violation of Section 8 (a) (3)	24
C. The Board and the court below correctly found that petitioner's discrimination en- couraged union membership notwithstand- ing the absence of testimony that any given person was encouraged to seek or to retain such membership	33
D. Properly found to violate Section 8 (a) (3) of the amended Act, petitioner's discrimina- tion was in any event equally violative of Section 8 (3) of the original Act	41
II. The General Counsel's complaint properly embraced all employees discriminated against by the retroactive wage and vacation payments	44
Conclusion	56
Appendix	57

CITATIONS

Cases:

*Allis-Chalmers Mfg. Co. v. National Labor Relations
Board*, 162 F. 2d 435, affirming 70 NLRB 348. 29, 32

II

<i>Brewster v. Gage</i> , 280 U. S. 327	51
<i>Broderick Co.</i> , 85 NLRB 708	43
<i>J. I. Case Co. v. National Labor Relations Board</i> , 321 U. S. 332	19
<i>Cathey Lumber Co.</i> , 185 F. 2d 1021, enforcing 86 NLRB 157, vacated, 189 F. 2d 428	8, 46, 47
<i>Chase Securities v. Donaldson</i> , 325 U. S. 304	54
<i>Clark v. Curtis</i> , 297 N. Y. 1014, 80 N. E. 2d 536	39
<i>Consolidated Edison Co. v. National Labor Relations Board</i> , 305 U. S. 197	45
<i>Consumers Power Co. v. National Labor Relations Board</i> , 113 F. 2d 38	45, 49, 55
<i>Costaro v. Simons</i> , 302 N. Y. 318, 98 N. E. 2d 454	39
<i>Cusano v. National Labor Relations Board</i> , 190 F. 2d 898	47
<i>Elastic Stop Nut Co. v. National Labor Relations Board</i> , 142 F. 2d 371, certiorari denied, 323 U. S. 722	38
<i>Ford Motor Co. v. Huffman</i> , Nos. 193 and 194 this Term	20
<i>Fort Wayne Corrugated Paper Co. v. National Labor Relations Board</i> , 111 F. 2d 869	55
<i>General Motors Corp.</i> , 150 F. 2d 201, enforcing 59 NLRB 1143	41
<i>General Talking Pictures Corp. v. Western Electric Co.</i> , 304 U. S. 175	2
<i>Helvering v. R. J. Reynolds Tobacco Co.</i> , 306 U. S. 110	51
<i>Humble Oil & Refining Co. v. National Labor Relations Board</i> , 113 F. 2d 85	37
<i>Joanna Cotton Mills v. National Labor Relations Board</i> , 176 F. 2d 749	47
<i>Johnson v. Manhattan Ry. Co.</i> , 289 U. S. 479	2
<i>Joy Silk Mills, Inc. v. National Labor Relations Board</i> , 185 F. 2d 732 certiorari denied, 341 U. S. 914	37
<i>Kansas Milling Co. v. National Labor Relations Board</i> , 185 F. 2d 413	47, 48, 49
<i>Katz v. National Labor Relations Board</i> , 196 F. 2d 411	43, 56
<i>Killifer Mfg. Corp.</i> , 22 NLRB 484	45
<i>Medo Photo Corp. v. National Labor Relations Board</i> , 321 U. S. 678	49
<i>Montgomery Ward & Co. v. National Labor Relations Board</i> , 107 F. 2d 555	17
<i>National Labor Relations Board v. A. S. Abell Co.</i> , 97 F. 2d 951	37
<i>National Labor Relations Board v. Air Associates, Inc.</i> , 121 F. 2d 586	32
<i>National Labor Relations Board v. American Creosoting Co.</i> , 139 F. 2d 193, certiorari denied, 321 U. S. 797	45
<i>National Labor Relations Board v. Bird Machine Co.</i> , 174, F. 2d 404	55
<i>National Labor Relations Board v. Bradley Washfountain Co.</i> , 192 F. 2d 144	47, 53
<i>National Labor Relations Board v. Brezner Tanning Co.</i> , 141 F. 2d 62	37
<i>National Labor Relations Board v. Cities Service Oil Co.</i> , 129 F. 2d 933	32

III

<i>National Labor Relations Board v. Dant & Russell</i> , 344 U. S. 375	44
<i>National Labor Relations Board v. Walt Disney Productions</i> , certiorari denied, 324 U. S. 877 146 F. 2d 44	32
<i>National Labor Relations Board v. Don Juan Co.</i> , 185 F. 2d 393	28
<i>National Labor Relations Board v. Donnelly Garment Co.</i> , 330 U.S. 219	36
<i>National Labor Relations Board v. Engelhorn & Sons</i> , 134 F. 2d 553	37
<i>National Labor Relations Board v. Epstein</i> , (C.A. 3), decided April 15, 1953	47
<i>National Labor Relations Board v. Ford Bros.</i> , 170 F. 2d 735	37
<i>National Labor Relations Board v. Fry Roofing Co.</i> , 193 F. 2d 324	28
<i>National Labor Relations Board v. Gluek Brewing Co.</i> , 144 F. 2d 847	28
<i>National Labor Relations Board v. Gullett Gin Co.</i> , 340 U. S. 361	51
<i>National Labor Relations Board v. Hudson Motor Car Co.</i> , 128 F. 2d 528	28
<i>National Labor Relations Board v. Illinois Tool Works</i> , 153 F. 2d 811	29, 37
<i>National Labor Relations Board v. Indiana & Michigan Electric Co.</i> , 318 U. S. 9	46
<i>National Labor Relations Board v. International Brotherhood of Teamsters</i> , No. 301, this Term	33, 41
<i>National Labor Relations Board v. Itasca Cotton Mfg. Co.</i> , 179 F. 2d 504	52
<i>National Labor Relations Board v. Andrew Jergens Co.</i> , 175 F. 2d 130, certiorari denied, 338 U. S. 827	3
<i>National Labor Relations Board v. Kingston Cake Co.</i> , 191 F. 2d 563	47, 52
<i>National Labor Relations Board v. Kobritz</i> , 193 F. 2d 8	46, 53
<i>National Labor Relations Board v. Link-Belt Co.</i> , 311 U. S. 584	36, 37
<i>National Labor Relations Board v. National Broadcasting Co.</i> , 150 F.2d 895	29
<i>National Labor Relations Board v. Reliable Newspaper Delivery, Inc.</i> , 187 F. 2d 547	10, 19
<i>National Labor Relations Board v. Tex-O-Kan Flour Mills Co.</i> , 122 F. 2d 433	49
<i>National Labor Relations Board v. Thompson Products, Inc.</i> , 130 F. 2d 363	29
<i>National Labor Relations Board v. United Hoisting Co., Inc.</i> , 198 F. 2d 465, certiorari denied, 344 U. S. 914	43, 56
<i>National Labor Relations Board v. Wells, Inc.</i> , 162 F. 2d 457	32
<i>National Labor Relations Board v. Western Cartridge Co.</i> , 139 F. 2d 855	32
<i>National Labor Relations Board v. Westex Boot & Shoe Co.</i> , 190 F. 2d 12	47

IV

<i>National Licorice Co. v. National Labor Relations Board</i> , 309 U. S. 350	49
<i>Newspaper & Mail Deliverers' Union</i> , 93 NLRB 419, en- forced, 192 F. 2d 654	39
<i>Order of Railroad Telegraphers v. Railway Express</i> <i>Agency</i> , 321 U. S. 342	19, 54
<i>Perkins v. Endicott Johnson Corp.</i> , 128 F. 2d 208	32
<i>Radio Officers' Union v. National Labor Relations Board</i> , No. 230, this Term	41
<i>Republic Aviation Corp. v. National Labor Relations</i> <i>Board</i> , 324 U. S. 793	12, 25, 26
<i>Rockaway News Supply Co., Inc.</i> , 94 NLRB 1056	19
<i>Ryan v. Simons</i> , 302 N. Y. 742, 98 N. E. 2d 707	39
<i>Steels v. Louisville & Nashville Railroad Co.</i> , 323 U. S. 192	12, 19, 20, 22
<i>Stokely Foods, Inc. v. National Labor Relations Board</i> , 193 F. 2d 736	47
<i>Superior Engraving Co. v. National Labor Relations Board</i> , 183 F. 2d 783, certiorari denied, 340 U. S. 930	56
<i>Texas & N. O. R. Co. v. Brotherhood of Railway Clerks</i> , 281 U. S. 548	31
<i>Wallace Corp. v. National Labor Relations Board</i> , 323 U. S. 248	20, 21, 23
<i>Western Cartridge Co. v. National Labor Relations Board</i> , 134 F. 2d 240, certiorari denied, 320 U. S. 746	37
<i>Wilson v. Newspaper & Mail Deliverers' Union</i> , 123 N. J. Eq. 347, 197 Atl. 720	39
<i>Zellerbach Paper Co. v. Helvering</i> , 293 U. S. 172	2
Statutes:	
Labor Management Relations Act, 61 Stat. 136, Sec. 102	42
National Labor Relations Act (Act of July, 1935, 49 Stat. 449, 29 U. S. C., 151 et seq.):	
Section 8 (3)	19, 21, 24, 41, 43, 59
Section 9 (a)	60
Section 10 (b)	45, 50, 60
Section 11	50, 61
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, et seq.):	
Section 3 (d)	46
Section 8 (a) (1)	28, 37, 57
Section 8 (a) (2)	28
Section 8 (a) (3) 1, 11, 16, 19, 21, 23, 24, 28, 37, 40, 42, 43	
Section 8 (a) (5)	28, 29
Section 9 (a)	58
Section 9 (e)	6
Section 10 (b)	2, 46, 48, 50, 53, 58
Section 11	50, 59
Miscellaneous:	
79 Cong. Rec. 7673	20
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53	45, 52
H. Rep. No. 1147, 74th Cong., 1st Sess.	20, 24, 34
H. Rep. No. 245, 80th Cong., 1st Sess., p. 40	52
S. Rep. No. 573, 74th Cong., 1st Sess., p. 13	20
S. 2926, 2nd Senate Print, 73rd Cong., 2nd Sess.	15
S. Rep. No. 1184, 73rd Cong., 2nd Sess., p. 6	15
S. Rep. No. 105, 80th Cong., 1st Sess., p. 26	52
Ward, <i>Discrimination under the National Labor Re-</i> <i>lations Act</i> (1939), 48 Yale L. J. 1152, 1166	25
Webster's <i>New International Dictionary</i> , 2nd Edition	17

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 121-128) is reported at 197 F. 2d 719. The findings of fact, conclusions of law, and order of the Board (R. 9-57) are reported at 93 NLRB 299.

JURISDICTION

The decree of the Court of Appeals was entered on July 8, 1952 (R. 129-132). The petition for a writ of certiorari was filed on October 2, 1952, and was granted on March 9, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Under Section 8 (a) (3) of the National Labor Relations Act it is unlawful for an employer

(1)

"by discrimination in regard to * * * any term or condition of employment to encourage * * * membership in any labor organization." The primary question presented is whether an employer who grants a retroactive wage increase and vacation payments to employees who are union members and withholds such benefits from other employees because they are non-members violates Section 8 (a) (3) in the absence of independent proof that his action was intended to, or did in fact, encourage union membership.

2. Whether, upon a timely charge filed by a single employee alleging that as a non-member of a union he was denied benefits granted union members only, the Board's General Counsel may, under Section 10 (b) of the Act, properly include in a complaint an allegation that the employer had discriminated against not only the charging employee, but also against all others similarly situated, even though no new charge had been filed with respect to these other employees.¹

¹ The third question presented in petitioner's brief (p. 3) was not presented in the petition for certiorari and is, therefore, not properly before this Court. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178, 179; *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479; *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182. Moreover, the question is moot inasmuch as the contract affected has expired. (G. C. Exh. 2, par. 19 (a), R. 57-58). This observation also applies to the discussion of the question in the brief of Newspaper and Mail Deliverers' Union, as amicus curiae (pp. 5-6). The Union's additional contention (Br. 5), that the decree of the court below is erroneous insofar as it enjoins petitioner

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, before amendment (49 Stat. 449, 29 U. S. C. 151 *et seq.*) and after amendment (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are set forth in the Appendix, *infra*, pp. 57-61.

STATEMENT

A. The Board's findings and conclusions

The Board held that petitioner had violated Section 8 (a) (1), (2), and (3) of the Act by refusing to accord to its non-union employees certain benefits which it granted to its union employees, and by executing and maintaining an agreement which contained an illegal union-security clause. The essential facts upon which the Board's conclusions rest are not in dispute (R. 79-80, 82), and may be summarized as follows:

from "Entering into, renewing, or enforcing any agreement with [the Union], * * * which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended" (R. 130), also does not come within the scope of the questions as to which this Court granted certiorari. Moreover, the provision in question is valid. Having found that petitioner had been party to a contract containing a union-security clause not authorized by Section 8 (a) (3) of the amended Act, the Board properly guarded against future unauthorized union-security agreements. The order does no more than require petitioner to observe in the future the statutory requirements with respect to union-security agreements. Cf. *National Labor Relations Board v. Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9), certiorari denied, 338 U. S. 827.

1. *Petitioner's discriminatory treatment
of its non-union employees*

Petitioner and the Union² have had collective bargaining agreements covering delivery department employees³ since 1943 (R. 21). On January 2, 1946, petitioner and the Union executed a collective bargaining contract which embraced members of the Union who were then or would thereafter be employed by petitioner (R. 21; 97). Under the contract petitioner was required to employ only members of the Union (R. 97); the Union, in turn, ordinarily admitted to membership only the first-born sons of persons who were already members (but see p. 39, *infra*.) The contract, however, also permitted employment of non-union personnel if the Union could not supply labor from its own ranks (R. 98), and petitioner did hire persons who were not union members and who did not thereafter become union members (R. 64). This agreement also provided for specified wages and paid vacations based on the number of days worked during the previous year (R. 98-99). The original termination date of the contract, October 16, 1947, was extended by a supplementary agreement dated August 22, 1946, for a period of one year, to October 16, 1948 (R. 95-96).

On October 9, 1947, petitioner and the Union executed a second supplementary agreement which

² Newspaper and Mail Deliverers' Union of New York and Vicinity.

³ These are the only employees involved in this proceeding.

provided that in the event the parties negotiated a new contract, the wage rates set therein would be applicable retroactively for three months in lieu of the wages provided in the old contract (R. 101-102). On October 25, 1948, petitioner and the Union entered into a new agreement, effective that day, which provided for increased wage and vacation benefits (R. 91-94).

As provided in the supplementary agreement of October 9, 1947, petitioner was obligated to apply the wage increase of the new agreement retroactively through the last three months of the old agreement. In November, 1948, petitioner paid *to its union employees only* a sum of money constituting the difference between the old and the newly increased wage rates for the three months' period. It failed and refused to pay the same differential to any of its non-union employees (R. 8-9, 23; 79, 82, 64-68).

In addition, petitioner awarded retroactively, to union employees only, the increased vacation benefits provided in the contract of October 25, 1948; it failed and refused to make similar payments to any of the non-union employees (R. 8-9, 23-24; 80, 82). This action was taken despite the fact that none of the contracts provided for retroactive application of the new vacation benefits (R. 26; 61-62).

Upon these facts the Board concluded that petitioner, by making retroactive wage and vacation

benefit payments to union employees because of their membership in the Union while failing and refusing to make such payments to non-union employees because they were not members, discriminated in regard to the terms and conditions of employment of the non-union employees so as to encourage membership in the Union, thereby violating Section 8 (a) (3) and (1) of the Act. The Board concluded further that petitioner, by according union employees preferred treatment, illegally assisted and supported the Union in violation of Section 8 (a) (2) of the Act (R. 29, 8-9).

*2. The illegal union-security clause in the
October 25, 1948 contract*

The October 25, 1948, contract contained a union-security clause which required all new employees hired by petitioner to become members of the Union thirty days following the beginning of their employment (R. 92).⁴ The Union had never been authorized in a Board-conducted election pursuant to Sections 9 (e) and 8 (a) (3) of the Act to negotiate a union-security agreement.⁵ The Board found on these facts that by entering into an agreement with the Union on October 25, 1948, which contained an unauthorized union-security provision, and by continuing this contract in effect, petitioner

⁴ This contract was in effect at the time of the hearing in July 1950 (R. 55).

⁵ During all times pertinent herein, Sections 8 (a) (3) and 9 (e) of the Act provided that union-security agreements could legally be executed only by unions which had been authorized to do so pursuant to a Board-conducted election.

had interfered with its employees' right to refrain from union activities, in violation of Section 8 (a) (1). The Board found further that by executing the illegal union-security agreement petitioner had lent its assistance and support to the Union in recruiting and maintaining its membership, in violation of Section 8 (a) (2) of the Act (R. 30-35, 8 n. 4).

*3. The validity of the complaint issued by the
General Counsel*

The original charge initiating these proceedings was filed on February 1, 1949, by Sheldon Loner, one of the non-union employees, and served on petitioner on February 3, 1949 (R. 74-75, 78, 82). It alleged that petitioner, in violation of Section 8 (a) (1) and (3), had discriminated against Loner by refusing to make his October 1948 wage increase retroactive and by refusing to pay him vacation benefits because of his non-membership in the Union (R. 74-75). An amended charge filed by Loner on June 13, 1950, repeated those allegations and also alleged that petitioner had violated Section 8 (a) (1) and (2) by executing the October 25, 1948, contract containing an illegal union-security clause (R. 76-77). The General Counsel's complaint, issued on June 13, 1950, repeated the allegations in the amended charge and added the allegation that petitioner had refused to make the retroactive wage and vacation payments not only to Loner but to all employees similarly situated

(R. 79-80). The Board rejected petitioner's contention that under the six-month period of limitations contained in Section 10 (b) of the Act the complaint could properly include only the violations alleged in the original charge. Relying on its holding in *Cathey Lumber Co.* 86 NLRB 157, 162-163,⁶ the Board held "that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing and service of such charge" (R. 19-20).

B. The Board's order

The Board's order (R. 9-12), as enforced by the court below, prohibits petitioner from encouraging membership in any union by discriminating in regard to hire, tenure, terms and conditions of employment. The order also requires petitioner to stop performing or giving effect to its contract of October 25, 1948, with the Union and to refrain from executing or enforcing any agreement with the Union which contains a union-security clause unless such agreement has been authorized as provided by the Act.

Affirmatively, the order requires petitioner to reimburse the non-union employees for any loss of pay which they suffered because of petitioner's discrimination, and to post notices, in the usual

⁶ Enforced, 185 F. 2d 1021 (C. A. 5), vacated on other grounds, 189 F. 2d 428.

form, stating that it will comply with the Board's order.⁷

C. The decision of the court below

Except for the modification noted (n. 7, this page), the court below enforced the order of the Board (R. 128-130).

1. *The validity of the complaint.* Noting that the complaint expanded upon the charge to include all non-union employees discriminated against, the court observed (R. 122-123):

We feel that the enlarged complaint can be justified here on the "relating back" theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition certainly could not prejudice the employer's preparation of his case or mislead him as to what exactly he was being charged with.

The court further stated that the allegation in the complaint that the discrimination, characterized in the charge as a violation of Section 8 (a) (1) and (3), also violated Section 8 (a) (2), "was only a

⁷ The order originally entered by the Board also required petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of the employees (R. 10). This portion of the order was set aside by the court below, one judge dissenting (R. 127-128), and the Board has not sought review of this aspect of the case.

change in legal theory and not in the nature of the offense charged" (R. 123). With respect to the union-security contract, the court held that since the contract was still in force at the time of the amended charge alleging its illegality, "the six months' limitation period of Section 10 (b) had not even begun to operate" (*ibid.*).

2. *The merits.* The granting of benefits to union members and the withholding of benefits from non-members, the court held, was "discriminatory conduct * * * inherently conducive to increased union membership" in that it increased "the number of workers who would like to join and/or their quantum of desire" (R. 124). Rejecting petitioner's contention that the non-union employees, who were ineligible for membership under the Union's rules, had already tried to join the Union and hence were not "encouraged" to do so by the discrimination against them, the court held that "these rejected applicants have been and will continue to be 'encouraged' by the discriminatory benefits in their desire for membership * * *. If and when the barriers are let down, among the new and successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination" (R. 124-125). The court noted that here, unlike *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), the Union "represented the majority of employees and was the exclusive bargain-

ing agent for the plant" so that it could not legally bargain "for special benefits to union members only" (R. 123-124).

The court also agreed with the Board that the union-security contract was invalid because it had not been authorized by the special election then required by the Act (R. 126). Petitioner did not seek review of this aspect of the case in its petition for a writ of certiorari.⁸

SUMMARY OF ARGUMENT

I

A. By making membership in the Union the basis for awarding retroactive wage and vacation pay, petitioner committed an act of "discrimination" which "encouraged" membership within the meaning of Section 8 (a) (3). Petitioner's contention that its conduct was not "discriminatory" because the payments were made pursuant to contract with the Union furnishes no defense. The Act does not permit, in the circumstances of this case, a contractual arrangement obligating the employer to make wage payments to union members but leaving the employer free to withhold wage payments from similarly situated nonmembers. The Union represented a majority of the employees and was the exclusive bargaining agent of all the employees. As such, the Union was obligated under the Act to bargain evenhandedly for both

⁸ See, n. 1, *supra*, p. 2

members and nonmembers and could not validly contract for special benefits for its members that would not be extended to the nonmembers. "No more is [petitioner] bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, 203-204.

B. The fact that petitioner may not have intended to encourage membership in the Union by its disparate treatment of members and nonmembers is not material. Once it appears, as it does here, that the employer has discriminated against nonmembers because of their nonmembership, a violation of Section 8 (a) (3) is established and the employer's purpose in so discriminating is immaterial. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 805. The employer is not excused from the consequences of unlawful conduct because he may have yielded to the economic power of the Union. This is so because the statutory safeguards vouchsafed employees are as much abridged whether the discrimination results from economic pressures on the employer or from his deliberate intent to favor a particular union or its members.

C. Contrary to petitioner's contention, the Board need not show, to establish a violation of Section 8 (a) (3), that particular employees were actually encouraged to join the Union. It is

enough that from the character of the discrimination it may reasonably be inferred that it tends to encourage membership. The actual reaction of the employees need not be demonstrated. This Court has recognized that the testimony of employees as to whether they were or were not affected by the conduct constituting an unfair labor practice is of little probative value. The test for determining whether discriminatory treatment violated the Act cannot be made to depend upon the particular temperaments of the particular employees discriminated against.

The disparate treatment accorded to the nonmembers by petitioner, realistically viewed, gives rise to a fair inference that nonmembers will be encouraged to acquire membership in the Union. The fact that the employees in this case may have already desired to join the Union, and were barred by its membership rules, does not take this case outside the general rule that proof of "encouragement" of specific employees is not required. The desire of these employees to surmount the obstacle to their becoming members would inevitably be increased by the discrimination. Moreover, the discrimination in favor of members would also encourage the employees now in the Union to retain their union membership and encourage employees in the industry, otherwise eligible, to join the Union.

The General Counsel's complaint properly alleged that petitioner's discriminatory wage and vacation payments violated the Act with respect to all non-union employees. The fact that the charge, filed by one of the non-union employees, alleged discrimination only as to him did not preclude the General Counsel from including in the complaint the other employees discriminated against. The power of the Board thus to expand upon a charge was well-settled under the Wagner Act; it was then recognized that the charge merely served to set in motion the Board's investigatory machinery. Any other result would have curtailed the Board's power to vindicate the public interest in the redress of unfair labor practices. The Taft-Hartley amendments did not alter the function of a charge and did not affect the General Counsel's investigatory powers or his right to amend the complaint at any time. The new requirement that charges be filed within six months of the unfair labor practice did not limit the General Counsel's or the Board's power to deal with unfair labor practices committed within that period. Furthermore, in the instant case, the discriminatory conduct alleged in the charge is the same as that alleged in the complaint; the sole variance is in the number of employees affected by the single unlawful act. Every purpose of a statute of limitations is served, and petitioner suffers no hardship, surprise, or other

prejudice, by the inclusion in the complaint of all the employees discriminated against by the unlawful act alleged in the charge.

ARGUMENT

I

By making membership or nonmembership in the Union the basis for determining whether an employee would receive additional compensation, petitioner violated Section 8 (a) (3) of the Act which forbids an employer "by discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization"

The Senate Committee on Education and Labor, reporting out an early version of the Wagner Act which contained a ban on discrimination almost identical with Section 8 (a) (3) of the present National Labor Relations Act,⁹ stated that under the proposed legislation no employer is "free to pay a man a higher or lower wage solely because of his membership or non-membership in a labor organization." S. Rep. No. 1184, 73rd Cong., 2nd Sess., p. 6. The same principle, we submit, governs this case.

Petitioner admittedly granted a retroactive wage increase and vacation pay to all the union members among its employees, admittedly withheld these

⁹ Section 3 (4) of that bill provided that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment, or by contract or agreement, to encourage or discourage membership in any labor organization." S. 2926, 2nd Senate Print, 73rd Cong., 2nd Sess.

benefits from all the nonmembers among its employees, and admittedly made union membership the sole factor in determining which employees would receive the benefits in question (R. 63-64, 67-68). Upon these facts the Board and the court below held that petitioner had violated Section 8 (a) (3) of the Act which forbids an employer—

by discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Petitioner contends, however, that it did not “discriminate” against non-union employees, and that even if it did, such discrimination was not unlawful in the absence of a showing that the discrimination was intended to, and did in fact, encourage union membership. We show below (A) that petitioner’s treatment of nonmembers constituted “discrimination,” (B) that petitioner’s motive in discriminating against its non-union employees is irrelevant, and (C) that since the discrimination necessarily tended to encourage union membership, specific evidence that any particular individual was encouraged to seek or to retain union membership is not required to establish a violation of Section 8 (a) (3).

A. By making retroactive wage and vacation payments to union members only, petitioner engaged in "discrimination" within the meaning of Section 8 (a) (3)

The adoption by an employer of union membership as a standard of compensation, paying higher wages to union members and lower wages to nonmembers, is "discrimination in regard to * * * [a] term or condition of employment" in the clearest literal sense of these words.¹⁰ Petitioner contends (Br. 5) that its payment of retroactive wages to union members was in fulfillment of its contract with the Union; that this contract did not require that the nonmembers be similarly compensated; and that "since it was not contractually bound to pay extra benefits to its relatively temporary non-Union employees,¹¹ in its business judgment, it did

¹⁰ Webster's *New International Dictionary*, 2nd Edition, defines "discrimination" as meaning, *inter alia*, "A distinction, as in treatment * * * Specif., * * * a difference in treatment made between persons * * * in respect of substantially the same service." See also, *Montgomery Ward & Co. v. National Labor Relations Board*, 107 F. 2d 555, 563-564 (C. A. 7).

¹¹ To distinguish between union members and nonmembers petitioner sometimes refers to them, respectively, as "permanent personnel" and "temporary personnel" (*e.g.*, Br. 5, 16). To describe the nonmembers as "temporary" is singular in view of the fact that the only evidence in the record of actual length of service showed that the particular nonmember had been in petitioner's employ for about a year and a half (R. 62, 65), a degree of tenure which in common understanding would seem to rate as more than temporary. The fact is that retroactive wage and vacation benefits were withheld from the non-members, not because of any relevant difference in their

not do so." But this explanation states no reason why the ensuing disparity is not the precise "discrimination in regard to * * * any term or condition of employment" contemplated by the statute. Therefore, unless the statute privileges a contractual arrangement obligating the employer to make wage payments to union members but leaving the employer free to withhold such wage payments from similarly situated nonmembers,¹² the contract is irrelevant. And we think it clear that the statute does not privilege such an arrangement in the circumstances of this case.

As the court below observed (R. 124), the "union here represented the majority of employees and was the exclusive bargaining agent for the plant."¹³ By virtue of the Union's status, the non-

length of service in comparison with the union members, but only because they were not in the Union (R. 61-68): In other words, except for their nonmembership status, the nonmembers qualified for the retroactive benefits paid the union members.

¹² The Board found that the contract did not prevent petitioner from paying retroactive wages to nonmembers if it so chose (R. 9, 26). If petitioner contends that the contract *required* it to limit payments to union members, the fallacy of its defense is compounded for the reasons we state below.

¹³ Petitioner does not contest that this was the status of the Union. At the hearing before the examiner, petitioner stated in argument that "It [the Union] is the union which is the exclusive bargaining agent for all of the newspapers in the Metropolitan area, of which we are one. It has the complete control of that industry, from the viewpoint of labor. It represents a monopoly in that field" (Tr. 336). In its brief, petitioner states (pp. 8-9) that it has "a long bargaining history"

members no longer had the power to bargain on their own behalf but were required to adhere to the terms of employment contracted for by the Union. *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342. The preemptive power acquired by the Union carried the corresponding duty to represent all the employees in the unit, "regardless of their union affiliations or want of them"; the Union is "to secure" for all, it is "to deprive" none, of the "benefits of collective bargaining"; and in representing all, "the majority as well as the minority," it is "to act for and not against those whom it represents." *Steele*

with the Union "of whose representative status there has never been any question", and (p. 3) that "in 1946," it "concluded a valid closed shop agreement" with the Union. Since under both Section 8(3) of the original Act and Section 8(a)(3) of the amended Act, a *valid* union security agreement may be entered into only with an exclusive bargaining representative, petitioner was necessarily representing that this was the Union's status.

As the court below pointed out (R. 123-124), it is the Union's exclusive representative status in this case which decisively distinguishes *National Labor Relations Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547, where the Third Circuit found that the union represented a minority of the employees and contracted on behalf of its members only; for this reason, the Third Circuit continued, the employer could withhold from nonmembers the advantages secured by the minority union for its members. Since the record of this case does not present this question, we pretermitt discussion of it, except to note the Board's disagreement with the Third Circuit. *Rockaway News Supply Co., Inc.*, 94 NLRB 1056, 1058-1059.

v. Louisville & Nashville Railroad Co., 323 U. S. 192, 200-202; see also, *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 255; *Ford Motor Co. v. Huffman*, Nos. 193 and 194 this Term, slip op. 7-8. In a footnote to the latter statement in *Steele* (323 U. S., at 202, n. 3), this Court added, summarizing the essence of H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 20-22, that "under the N.L.R.A., the employer was required to give 'equally advantageous terms to nonmembers of the labor organization negotiating the agreement.' See also the Senate Committee Report on the N.L.R.A. to the same effect. S. Rep. No. 573, 74th Cong., 1st Sess., p. 13." The Senate Report at the cited page stated that "the representatives selected by the majority will be quite powerless to make agreements more favorable to the majority than to the minority." Similarly, Senator Wagner during the debate on the bill stated (79 Cong. Rec. 7673) :

Under this proposed legislation, assuming an agreement has been consummated by the agency elected by the majority of the employees, there will be no advantage which a majority can have under an agreement to which the minority is not also entitled, and in order to have that advantage the minority need not join any organization. It can join or not join, either way. It cannot be discriminated against under any other provision of the law.

Petitioner states (Br. 3) that, "as with every closed shop contract," its closed shop contract with the Union "was applicable to Union members only." Petitioner's assumption that a union having a closed shop contract is not obligated to bargain evenhandedly for any nonmembers in the unit is inaccurate. Under both Section 8(3) of the original Act and Section 8(a)(3) of the amended Act, as a condition precedent to negotiating a closed shop agreement (and the lesser form of union-security agreement permitted by the amended Act), the union must first qualify as an exclusive representative. That exclusive status at once places on the union the duty of impartial representation. Nothing in the Act justifies an assumption that, in negotiating for a closed shop, a union may in fact bargain itself out of its statutory duty of fulfilling its obligation to represent fairly all the employees in the unit. Indeed, in *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 255, it was in reference to a union having a closed shop contract that this Court stated: "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union

at the time it is chosen by the majority would be left without adequate representation."

It is therefore clear, as the court below held (R. 124), that the Union "could not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." In relying on the contract to justify its preferential treatment of union members, petitioner is in effect contending that the Union's default in performing its obligation of evenhanded representation takes the disparity out of the statutory class of "discrimination in regard to * * * any term or condition of employment." But that default emphasizes rather than minimizes the discrimination practiced. Petitioner is not "entitled to take the benefit of a contract which the bargaining representative is prohibited by statute from making." *Steele* case, *supra*, at 203-204.

Petitioner's position is in fact more broadly based than reliance on the contract alone. In addition to making retroactive wage payments to union members, as required by the contract, petitioner paid retroactive vacation benefits to union members, though not required to do so by the contract, while withholding such vacation benefits from non-members (R. 25-26; 61-62, 63-64; 78-79, 81-82). To justify this disparity, petitioner states that, "in granting such a gratuitous benefit, the employer weighed the cost in terms of maintaining harmon-

ious labor relations with its permanent personnel.”¹⁴ (Pet. 3; see also *id.*, p. 14, n. 3; cf. Br. 17, n. 7). At the hearing before the examiner petitioner stated less guardedly that vacation benefits were paid union members at least in part in order “to maintain peace with the union” (R. 61). Realistically, therefore, petitioner means simply that it was concerned with maintaining harmony with the union members, who had the backing of organizational strength behind them, but that it was indifferent to the nonmembers, who did not enjoy organizational support. “The Labor Relations Act was designed to wipe out such discrimination in industrial relations.” *Wallace Corp. v. National Labor Relations Board*, 323 U. S. 248, 256.

It is clear, in sum, that by granting retroactive wage and vacation payments to union members and withholding them from nonmembers, petitioner engaged in “discrimination in regard to * * * any term or condition of employment” within the meaning of Section 8(a)(3). We turn to consider whether by this discrimination petitioner “encouraged” union membership.

¹⁴ See n. 11, p. 17, *supra*.

B. Petitioner's motive in discriminating among its employees on the basis of union membership is immaterial to the question whether the discrimination encouraged union membership in violation of Section 8(a)(3)

In commenting on the reach of Section 8(3) of the original Act, now Section 8(a)(3) of the amended Act, the House Report stated that "agreements more favorable to the majority than to the minority are impossible, for under section 8(3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization.' " H. Rep. No. 1147, 74th Cong., 1st Sess., p. 21. That is this case.

Petitioner nevertheless urges (Br. 5, 6, 21-22, 24-29) that, even if the union-encouraging tendency exists, which it disputes (see *infra*, pp. 33-41), the discrimination practiced is not outlawed because, as it asserts, petitioner had no motive, purpose or desire to encourage membership in the Union; that on the contrary it was opposed to the Union; that it would suffer financial loss by an increase in the Union's membership; and that consequently it did not "encourage" membership in the Union within the meaning of Section 8(a)(3). But the statute does not make the employer's motive in this sense the test of whether his conduct in discriminating is unlawful.

The heart of petitioner's position is that Section 8(a)(3) condemns only such union-discouraging conduct as flows from an employer's anti-union

animus and, conversely, only such union-encouraging conduct as stems from his pro-union bias.¹⁵ This notion was rejected by this Court in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, which controls here. In *Republic Aviation*, the employer adopted a rule against any solicitation on its premises and, "without any animus against unions, general or particular,"¹⁶

¹⁵In support of its position petitioner relies on some general observations by Prof. C. C. Ward in *Discrimination under the National Labor Relations Act* (1939), 48 Yale L. J. 1152. Petitioner's reliance upon these observations, if not misplaced, is at best dubious. In the same article Prof. Ward, posing substantially the case here, reaches the same result as did the Board and the court below. "To illustrate," writes Prof. Ward (at p. 1166), "if a majority union by reason of its superior economic power and favored position under the Act, has overcome an employer's resistance to any type of contract other than one containing a closed shop clause, and has secured an agreement requiring, for members only, wage increases, minimum guaranties, or vacations, is it an unfair labor practice for the employer to fail to grant similar concessions to non-union employees, even though the contract purports to restrict them to union members? Obviously the answer is yes. . . . In such a situation, although the Board has never mentioned it, the non-union employees are clearly entitled to file charges of violation of Section 8 (3), and the Board, to maintain a consistent position with its remedies in discouragement cases, would have to order differential back pay if union members had been receiving higher wages for the same work." In the instant case the contract did not even purport to restrict the retroactive payment of wages and vacation benefits to union members; petitioner on its own initiative concluded to restrict these payments to union members.

¹⁶The quoted statement is from the Second Circuit's decision affirmed by this Court in *Republic Aviation*. 142 F. 2d 193, 195.

enforced the rule impartially against solicitation of union membership within the plant during non-working time. After warning, an employee persisted in violating the rule by soliciting union membership during his lunch period, and for this infraction he was discharged "without discrimination on the part of the employer toward union activity" (324 U. S. at 795). The employer contended that, whether or not the no-solicitation rule was itself invalid, the discharge for its infraction did not violate Section 8(3), for "the discharge resulted from the impartial enforcement of the rule, and was not in any way motivated by *anti-union cause*." Petitioner's Brief, p. 27, No. 226, October Term, 1944 (emphasis supplied). Holding the rule invalid, this Court rejected the employer's defense, explaining that (324 U. S. at 805):

* * * petitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate § 8(3), * * * because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization.

Thus this Court held that the discharge, not privileged by a valid reason, offended Section 8(3) "in that it discourages membership," and it did not matter that the discouragement was not the result of an anti-union purpose but was in fact innocent of any such motive. So in this case, the disparate treatment accorded the nonmembers, not privileged by the statute (*supra*, pp. 17-23), and having a union-encouraging tendency (*infra*, pp. 33-41), violated Section 8(a)(3) even if the encouragement was unintended.

From the earliest days of the Act it has been contended, precisely as petitioner contends here, that acts of discrimination in favor of members of a particular union were not unlawful because they did not spring from any purpose to encourage membership but were compelled by the union's economic power over the employer. Without exception these contentions have been rejected by the courts, which have held that the employer's lack of intention to encourage union membership was no defense to his conduct in actually so doing. As the courts have recognized, to hold that an employer may engage in discriminatory conduct, or commit other unfair labor practices, with impunity, provided only that he had no "intent" to violate the Act, would go far to nullify the protection which the statute extends to employees. This is so because the statutory safeguards vouchsafed employees are as much abridged whether the discrimi-

nation results from economic pressures on the employer or from his deliberate intent to favor a particular union. See, *e.g.*, *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C. A. 6); *National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C. A. 8), and cases there cited; *National Labor Relations Board v. Fry Roofing Co.*, 193 F. 2d 324, 327 (C. A. 9); *National Labor Relations Board v. Don Juan Co.*, 185 F. 2d 393 (C. A. 2). As stated by the Sixth Circuit in *Hudson Motor Car*, *supra*:

We think it right and just to say that so far as the record shows, [the employer] has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives.

Section 8(a)(3), like its companion Sections 8(a)(1), 8(a)(2) and 8(a)(5), is concerned with the effect of employer conduct upon employees rather than with the employer's motive in undertaking the proscribed conduct. Section 8(a)(3) makes it an unfair labor practice "by discrimination * * * to encourage or discourage membership," Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce," Section 8(a)(2) makes it an unfair labor practice "to dominate [or support] * * * any labor organization,"

and Section 8(a)(5) makes it an unfair labor practice "to refuse to bargain." In construing all of these sections the courts have agreed that proof of the employer's motive is not an essential element of the offense. Thus, the courts have held that "the test of interference, restraint and coercion under Section 8(1) of the Act does not turn on the employer's motive * * *" (*National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7)); that "the test, whether a challenged organization is employer controlled is not an objective one, but rather subjective, from the standpoint of employees" (*National Labor Relations Board v. Thompson Products, Inc.*, 130 F. 2d 363, 368 (C. A. 6)); and that a refusal to bargain "cannot be excused because of economic pressure exerted against the employer by one of the unions engaged in a jurisdictional labor dispute" (*National Labor Relations Board v. National Broadcasting Co.*, 150 F. 2d 895, 900 (C. A. 2)). In short, "whatever purpose an employer may have in demoting or otherwise adversely affecting the employment status of his employees who engage in lawful union activity, so long as that action would not have been taken in the absence of such union activity, the employer thereby necessarily discourages membership in the labor organization * * *." *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 440 (C. A. 7).¹⁷

¹⁷ In the cited case the Seventh Circuit went on to say: "Moreover, an employer may not discriminate against an

In sum, where, as here, the sole distinguishing factor resulting in the discriminatory treatment of certain employees is their union membership, or want thereof, the employer's underlying purpose in thus discriminating is irrelevant in determining whether he has violated the Act. Petitioner points out (Br. 23) that both the Board and the courts have had occasion to inquire whether dis-

employee because of his membership or activity in a union even though the employer believes that he has good business reasons to justify his discrimination." The Seventh Circuit thus affirmed the position taken by the Board in the decision under review, namely (70 NLRB 348, 349-350):

The purpose of the Act is to protect employees in their right to self-organization, to protect employees from conduct by employers which, experience indicates, has a tendency to thwart self-organization. One of the most powerful forms of intimidation is to penalize employees because of their membership in or their activities in behalf of a union. To protect employees against this form of intimidation, Congress specifically made it unlawful for an employer "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Radically to alter the job content of a position and to reduce the pay *concededly because* employees have selected a particular union as collective bargaining agent is to practice the clearest variety of discrimination banned by the Act. Such discrimination normally and naturally tends to discourage membership in a labor organization and is therefore an unfair labor practice. Here, to be sure, respondent was seeking to deal with what it considered, or anticipated to be, a management problem. But it is not determinative that the respondent may not primarily have intended to discourage membership in the Union. The vice in the respondent's action rests on the fact of discrimination.

crimination had "both the *purpose* and effect" of encouraging union membership before ruling that the discrimination violated Section 8(a)(3). From this petitioner mistakenly concludes that the Board in the present case overlooked an essential element of the offense in failing to take into account petitioner's lack of a union-encouraging motive. It is clear, however, that inquiry into the employer's purpose or motive is material only when the ultimate fact, admitted here, is contested—*i.e.*, only when it is disputed whether union affiliation or lack of it prompted the discrimination. Because an employer may discriminate for any reason other than union or concerted activities, the employer's motive becomes a critical ancillary issue whenever he contends that his conduct was motivated by factors other than union activity. In such cases, because "motive is a persuasive interpreter of equivocal conduct" (*Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks*, 281 U. S. 548, 559), proof of the employer's motive is necessary to ascertain the real cause of the discrimination—whether for union activity or for some other reason. In the instant case, the fact ordinarily contested is established—petitioner withheld benefits from certain employees solely and precisely because they were not union members—and, as we have shown (*supra*, pp. 24-29), petitioner's purpose is so discriminating is immaterial.

There is, then, no inconsistency whatever be-

tween the cases where inquiry has been directed to "both the purpose and effect" of discrimination—a phrase, incidentally, which originated with the Board (see note 18, this page)—and cases, like the present one, where the admitted fact of discrimination based on union membership or nonmembership makes such inquiry irrelevant.¹⁸ Like the Board, the same courts and judges who have found it necessary to consider the "purpose and effect" of discrimination have repeatedly ruled that this

¹⁸ The phrase invoked by petitioner was given its main judicial impetus by *National Labor Relations Board v. Air Associates, Inc.*, 121 F. 2d 586, 592 (C. A. 2), where Judge Frank writing for the Second Circuit, taking the language from the Board's decision (20 NLRB 356, 375), stated that "Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership." Judge Frank later explained in *National Labor Relations Board v. Cities Service Oil Company*, 129 F. 2d 933, 937 (C. A. 2), as he had already explained in *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 222, n. 51 (C. A. 2), that all the decision in *Air Associates* meant to convey was that there was no reasonable basis in the evidence for inferring that the discharges in question had a union-discouraging tendency. And it was Judge Frank who wrote for the Second Circuit in the present case without suggesting any change in view from what he had written before. Compare also the Ninth Circuit's decision in *National Labor Relations Board v. Wells, Inc.*, 162 F. 2d 457, 459-460, cited by petitioner, with its previous decision in *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 49, certiorari denied, 324 U. S. 877, in which two of the three judges were the same in both cases. And compare the Seventh Circuit's decision in *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F. 2d 435, 440, with its previous decision in *National Labor Relations Board v. Western Cartridge Co.*, 139 F. 2d 855, 858, cited by petitioner, in which all three judges were the same in both cases.

consideration is to be dispensed with where the crucial fact of union encouragement or discouragement is otherwise established.¹⁹

C. The Board and the court below correctly found that petitioner's discrimination encouraged union membership notwithstanding the absence of testimony that any given person was encouraged to seek or to retain such membership

Petitioner further contends that, in granting retroactive wage and vacation benefits to union members while denying them to nonmembers, its discrimination did not have the effect of encouraging membership in the Union.

At pages 37-43 of the Board's brief in *National Labor Relations Board v. International Brotherhood of Teamsters*, No. 301, this Term, we have shown that (1) discrimination is forbidden by Section 8 (a) (3) if it has a tendency to encourage or discourage union membership, and (2) the tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination. The discrimination in this case meets these standards.

It seems obvious that ordinarily, as the House Report put it, "If the employer should fail to give

¹⁹ Petitioner, although still denying that it intended to encourage membership in the Union, is not seeking review here of the Board's holding, approved by the court below, that petitioner unlawfully assisted and supported the Union by granting it an unlawful union-security clause.

equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization." H. Rep. No. 1147, 74th Cong., 1st Sess., 20. Because of this reasonably foreseeable consequence, the House Report later observed, "agreements more favorable to the majority than to the minority are impossible, for under section 8 (3) any discrimination is outlawed which tends to 'encourage or discourage membership in any labor organization'." *Id.* at 21. In this case the failure to grant the nonmembers the same retroactive payments given the union members disadvantaged at least one nonmember in the sum of \$308.52 (Tr. 124, 127). This would seem to provide no small incentive to acquiring membership in the Union. It is therefore a fair conclusion, as the court below held in agreement with the Board, that "Discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it 'encourages' union membership, by increasing the number of workers who would like to join and/or their quantum of desire" (R. 124).

Petitioner does not dispute (Br. 32) "that where a 'necessary tendency' may be inferred from the underlying facts the Board is entitled, in the absence of evidence to the contrary, to make an ultimate finding without the necessity of actually

proving that a certain person or persons were actually encouraged." But petitioner asserts that it was denied the opportunity of introducing evidence which would nullify the inference of a union-encouraging tendency in this case. Petitioner at the hearing summarized what it sought to show as follows (R. 68):

I know as a matter of fact that Mr. Loner [a nonmember who had filed the charge against petitioner] had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member of this union because of the restrictions of the union upon its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encourage him to membership because he was already trying to become a member of that union. And that is our case.

Relying upon this nonmember's already existing desire for membership and his ineligibility to acquire it, which we assume petitioner means is also the situation with respect to every other nonmember in its employ, petitioner contends that there is no basis for the inference that its discrimination had a union-encouraging tendency.

The first branch of petitioner's argument—that its discrimination was incapable of enhancing the previously acquired wish for membership—is pre-

mised on the assumption that it could show that each nonmember in its employ was already so saturated with a desire to join the Union that nothing petitioner did could increase it. The premise is fundamentally fallacious. What petitioner proposes to show is virtually impossible of proof within the limitations of an adversary system of litigation. How can it reliably be shown that each nonmember had reached that state of mind where the loss of three hundred dollars because of nonmembership in the Union would not further whet his desire to acquire the preferred status? How can it be shown that a dormant desire for membership has not been quickened to life by this additional evidence of its value? How can it be shown that each nonmember with his presumably different personality—some aggressive, some optimistic, some indifferent, some defeatist—has reached the same dead level of saturation or frustration so that all will be identically indifferent to this further stimulation?

It is for reasons like these that this Court has recognized that "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588. Unless one assumes that employees can reliably interpret the subtleties of their feeling, a gift calling "'for a high degree of introspective perception'" (*Nation-*

al Labor Relations Board v. Donnelly Garment Co., 330 U. S. 219, 231), their uncritical testimony concerning their special reactions to a particular stimulus is virtually worthless. Hence, the conclusion concerning the effect of proscribed conduct "must of necessity be based on the existence of conditions or circumstances * * * as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 588. This test, used to determine whether conduct tends "to interfere with, restrain, and coerce employees" in violation of Section 8 (a) (1), should apply equally to determine whether discrimination tends "to encourage or discourage" union membership in violation of Section 8 (a) (3). By this test it is enough that the tendency is reasonably inferred; the actual reaction of the employees in a given situation need not, because it cannot, be demonstrated.²⁰

²⁰ *Western Cartridge Co. v. National Labor Relations Board*, 134 F. 2d 240, 244-245 (C. A. 7), certiorari denied, 320 U. S. 746; *National Labor Relations Board v. Ford Bros.*, 170 F. 2d 735, 738 (C. A. 6); *Joy Silk Mills, Inc. v. National Labor Relations Board*, 185 F. 2d 732, 743-744 (C. A. D. C.), certiorari denied, 341 U. S. 914; *National Labor Relations Board v. Brezner Tanning Co.*, 141 F. 2d 62, 64 (C. A. 1); *National Labor Relations Board v. Engelhorn & Sons*, 134 F. 2d 553, 557 (C. A. 3); *National Labor Relations Board v. A. S. Abell Co.*, 97 F. 2d 951, 955-956 (C. A. 4); *Humble Oil & Refining Co. v. National Labor Relations Board*, 113 F. 2d 85, 92 (C. A. 5); *National Labor Relations Board v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7); *Elastic Stop Nut Co. v.*

In this case to give union members three hundred dollars more than nonmembers gives rise to a fair inference that nonmembers will be encouraged to acquire membership. To negative this inference petitioner must propose more than a psychological investigation incapable of reliable execution within the limitations of litigation.

Moreover, even if petitioner could negative the tendency of the discrimination to encourage nonmembers in its employ to acquire membership, petitioner has not even addressed itself to the influence exerted by the discrimination on the union members working for it. Certainly, as the Board found (R. 29), the preference accorded them by virtue of belonging to the Union would have the effect "of encouraging union employees to retain their union membership." Nor has petitioner addressed itself to the influence exerted on nonmembers in the industry not in its employ who, learning of the preferential treatment extended members, will be encouraged to join the Union in order to acquire the preferred status.

The second branch of petitioner's argument—that its discrimination was incapable of evoking a desire in nonmembers to join the Union because they were ineligible for membership—is basically inconsistent with the first branch of its argument.

National Labor Relations Board, 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

If the nonmembers, as petitioner first argues, are filled with a desire to join the Union, then the closed character of the Union—their ineligibility to join it—does not nullify the encouragement of them to become members. The ineligibility of a nonmember to join presents an obstacle to be overcome in acquiring membership; the discrimination in favor of union members presents the incentive to try to overcome the obstacle and is therefore union-encouraging in tendency. By way of concrete illustration, nonmembers of the union involved in this case have already had repeated occasion to resort to legal action in an effort to secure membership,²¹ and discrimination in wage payments such as that practiced by petitioner could well result in increasing such efforts to join the favored group. Moreover, the Board's own records reveal that the Union's membership lists are not as tightly closed as its rules indicate, for on more than one occasion the Union has offered to extend membership to non-union men in return for their cooperation. See *Newspaper & Mail Deliverers' Union*, 93 NLRB 419, 431, 433, 435, enforced, 192 F. 2d 654, 657 (C. A. 2). These illustrations give realistic point to the observation of the court below that the discrimination in favor of union members, obviously enhancing the attractiveness of union membership,

²¹ See *Clark v. Curtis*, 297 N. Y. 1014, 80 N. E. 2d 536; *Ryan v. Simons*, 302 N. Y. 742, 98 N. E. 2d 707; cf. *Costaro v. Simons*, 302 N. Y. 318, 98 N. E. 2d 454; *Wilson v. Newspaper & Mail Deliverers' Union*, 123 N. J. Eq. 347, 197 Atl. 720.

might well lead to redoubled efforts by nonmembers to surmount the Union's restrictions on membership. As the court said (R. 124-125):

It may well be that the union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these rejected applicants have been, and will continue to be, "encouraged," by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to "seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action." A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously "encouraged" by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator.

It is clear, in short, that the discrimination in this case offends Section 8 (a) (3), for it is "of such a character as to have a natural tendency [to encourage] union membership." *General Motors*

Corp., 59 NLRB 1143, 1145, enforced with immaterial modification, 150 F. 2d 201 (C. A. 3).

D. *Properly found to violate Section 8(a)(3) of the amended Act, petitioner's discrimination was in any event equally violative of Section 8 (3) of the original Act*

Petitioner contends (Br. 35) that Section 8(a) (3) of the amended Act contains "a provision to cover the precise situation existing in the case at bar"—referring to the proviso which forbids discrimination under a union-security agreement where an employee is denied union membership on discriminatory grounds or on grounds other than non-payment of dues—and that this "impels one to the conclusion that the National Labor Relations Act of 1935 left open the situation here complained of." We have shown that Section 8(3) of the original Act prohibited the conduct in this case. The amendatory legislation, sharply curtailing the scope of a union-security agreement, was directed to other apprehended evils, and in the deliberations preceding adoption of the amendment Congress in no way intimated that the original Act did not reach this case. See pp. 16-26 of the Board's brief in *National Labor Relations Board v. International Brotherhood of Teamsters*, No. 301, this Term, and pp. 24-25 of the Board's brief in *Radio Officers' Union v. National Labor Relations Board*, No. 230, this Term. Indeed, if the position advanced by petitioner in this case is correct, its conduct is still outside

the statute's reach. As in Section 8(3) of the original Act, Section 8(a)(3) of the amended Act defines the basic offense to be to encourage or discourage union membership by discrimination in employment; the provisos which follow are immaterial qualifications unless the conduct first falls within the scope of the basic offense. If, as petitioner contends, its conduct does not encourage union membership, that would be true under the amended as under the original Act. Hence, to be meaningful, petitioner's concession of liability under the amended Act must be taken either as a concession of liability under the original Act as well or as a demonstration of the fallacy of the inference it seeks to draw from the amendments.

Petitioner's argument also presupposes, as it claims (Br. 8, n. 2), that the conduct in this case is governed by Section 8(3) of the original Act and not Section 8(a)(3) of the amended Act. The basis for the argument is that, while the retroactive wage and vacation benefits were paid after the amendments became effective on August 22, 1947, they were paid pursuant to a pre-amendment agreement, not "renewed or extended" subsequent to the amendments, and hence governed by the original Act as provided in Section 102. The argument cannot apply to the vacation benefits because these were not paid pursuant to any agreement (*supra*, pp. 5, 22-23), and it is doubtful whether it is valid as applied to the wage pay-

ments. The 1946 agreement, as extended before the amendments, was to expire on October 16, 1948 (*supra*, p. 4). On October 9, 1947, after the amendments, a supplement to the 1946 agreement was negotiated which provided for (1) an increase in wage rates, (2) the procedure to be followed in the negotiation of a successor agreement, and (3) in the event that the parties later negotiated a new contract, the payment of a three-month retroactive wage increase based on the rates set by the new contract (R. 101-102, 99). On October 25, 1948, a new agreement was reached for an additional term raising the wage scale and hence bringing into operation the retroactive wage payment condition specified in the post-amendment 1947 supplemental agreement (R. 91-94). These significant post-amendment changes raise a serious question whether they do not suffice to constitute a renewal or extension of the pre-amendment agreement within the meaning of Section 102. Compare *Broderick Co.*, 85 NLRB 708; *National Labor Relations Board v. United Hoisting Co.*, 198 F. 2d 465, 467-468 (C.A. 3), certiorari denied, 344 U. S. 914; *Katz v. National Labor Relations Board*, 196 F. 2d 411, 415-416 (C.A. 9). But the Board had no occasion to resolve this question in this case since petitioner was found to have effected discrimination encouraging union membership which was unlawful under Section 8(3) of the original Act as well as Section 8(a)(3) of the amended Act.

II

The General Counsel's complaint properly embraced all employees discriminated against by the retroactive wage and vacation payments

The charge initiating this proceeding was filed by Sheldon Loner, one of the non-union employees discriminated against when petitioner awarded retroactive wage and vacation payments. In the charge, Loner alleged that petitioner, by the refusal to pay him retroactive wages and vacation pay, had discriminated against him in violation of Section 8(a)(3) of the Act (R. 93-94). The complaint issued by the General Counsel after investigation of the charge²² alleged that by the discriminatory wage and vacation payments petitioner had violated the Act with respect to all of its employees who were not members of the Union, including Loner (R. 99-100). The Board's order, enforced by the court below, directs back pay for Loner "and all other non-union employees, who were similarly situated" (R. 14). Petitioner contends that under the six-month period of limitations contained in Section 10(b) of the Act, the complaint and order are invalid insofar as they embrace any employees other than Loner.²³

²² The "charge" initiates an investigation which may or may not culminate in the issuance of a "complaint." See *National Labor Relations Board v. Dant & Russell*, 344 U. S. 375.

²³ The unfair labor practices occurred in November 1948 (retroactive wage payments) and January 1949 (vacation pay); the charge was filed on February 1, 1949, and served

Section 10(b) of the original Wagner Act provided that

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended * * * at any time prior to the issuance of an order based thereon.

Under this Section it was repeatedly held that the Board's complaint was not limited to the violations alleged in the charge, but could embrace other violations uncovered by the Board in the course of investigating the charge. See, *e.g.*, *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 225, 238; *Consumers Power Co. v. National Labor Relations Board*, 113 F. 2d 38, 42-43 (C. A. 6); *National Labor Relations Board v. American Creosoting Co.*, 139 F. 2d 193, 195 (C. A. 6), certiorari denied, 321 U. S. 797; *Killifer Mfg. Corp.*, 22 NLRB 484, 488. As this Court observed, the charge "merely sets in motion the ma-

on petitioner on February 3, 1949; the complaint issued June 13, 1950 (R. 77-78, 83-84, 93-94, 97-101). Congress expressly declined to place a time limitation upon the issuance of complaints. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53.

chinery of an inquiry. * * * [It] does not even serve the purpose of a pleading." *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. Under the original Act, therefore, if an individual filed a charge alleging discrimination against himself, the Board was unquestionably authorized to issue a complaint alleging discrimination against the charging party and other employees who were the victims of the identical discrimination.

Petitioner argues, however (Br. 40-42), that the limitations proviso added to Section 10(b) by the Taft-Hartley Act curtailed the General Counsel's Power in this respect.²⁴ The proviso, inserted at the end of the first sentence of Section 10(b), states that

no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

Petitioner contends that this proviso precludes the General Counsel from alleging that the conduct described in the charge discriminated against other employees as well as the charging party. We show below, as the Board has fully explained in *Cathey Lumber Company*, 86 NLRB 157, (1) that this contention, rejected by the court below (R. 153-155) and by several other courts of appeals,^{24a} is

²⁴ Section 3(d) of the amended Act vests the General Counsel with final authority, on behalf of the Board, in respect of the issuance of unfair labor practice complaints.

^{24a} *National Labor Relations Board v. Kobritz*, 193 F. 2d. 8,

inconsistent with the general statutory scheme which places upon the Board, rather than on private individuals, primary responsibility for the protection of the public rights created by the Act, and (2) that it is without support in either the language or the purpose of the limitations proviso.

1. As noted above, it was recognized that under the original Act the charge was not required to particularize all the acts and conduct later alleged in the complaint as violations of the Act; *a fortiori*, under the original Act a charge which specified the unfair labor practices did not have to list the names of the employees discriminated against by the unlawful conduct. In amending the Act, Con-

14-16 (C. A. 1); *National Labor Relations Board v. Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *Cusano v. National Labor Relations Board*, 190 F. 2d 898, 903 (C. A. 3); *National Labor Relations Board v. Epstein*, (C. A. 3) decided April 15, 1953; *National Labor Relations Board v. Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C. A. 5); *Stokely Foods, Inc. v. National Labor Relations Board*, 193 F. 2d 736, 737 (C. A. 5); *Cathey Lumber Co. v. National Labor Relations Board*, 185 F. 2d 1021 (C. A. 5), enforcing 86 NLRB 157, 162, vacated on other grounds, 189 F. 2d 428; *National Labor Relations Board v. Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *Kansas Milling Co. v. National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

The sole decision to the contrary is *Joanna Cotton Mills v. National Labor Relations Board*, 176 F. 2d 749, 754 (C. A. 4), where after setting aside the Board's order on substantive grounds, the court also noted that the amended charge alleged violation of a different section of the Act and hence "brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge." In the instant case both the charge and the complaint alleged violation of the same provisions in the same manner.

gress provided in Section 10(b) that charges be filed and served within six months of the unfair labor practices alleged. However, Congress did not otherwise alter the requirements of a charge, and, contrary to petitioner's contention, Congress nowhere provided that charges under the amended Act need be any more specific or exhaustive than those under the original Act. Indeed, every reason which prompted the courts to hold that charges under the original Act need not detail the unfair practices alleged applies with equal force under the amended Act. As before, so now, "Anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading." *Kansas Milling Co. v. National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10). To assume that the charge fixes the scope of the ensuing inquiry, therefore, is to suppose that Congress removed this vital aspect of enforcement from the expert agency charged with administering the Act and delegated it to any layman who might file a charge.

Furthermore, to require a charging party to particularize each and every act constituting an unfair labor practice would place upon him the burden and expense of investigating and determining the full nature and scope of the employer's or the union's misconduct. But Congress rested the responsibility of investigating such details with the Board, a public agency vested by statute

with the necessary investigatory machinery. Moreover, to require the details of the unfair labor practices to be specified in the charge would place upon the charging party the responsibility of framing the issues in the case, a matter which Congress left to the General Counsel in the complaint. *National Labor Relations Board v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 437 (C. A. 5); *Consumers Power Company v. National Labor Relations Board*, 113 F. 2d 38, 42 (C. A. 6); *Kansas Milling Co. v. National Labor Relations Board*, 185 F. 2d 413, 415-416 (C. A. 10).

If, as petitioner contends, the charge must set forth the precise nature and extent of all claimed violations, a function traditionally served by the complaint, then the failure of the charging party to allege certain violations would preclude their development by the General Counsel—a situation hardly consistent with the statutory scheme that the Board proceeds, not in vindication of private rights, but as an administrative agency charged by Congress with the function of enforcing the Act and bringing about compliance with its provisions. See *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 362, and authorities there cited; see also *Medo Photo Corp. v. National Labor Relations Board*, 321 U. S. 678, 687. Nothing in the amended Act suggests that Congress intended any such drastic departure from the basic concept that the Board, once its

jurisdiction is invoked, acts in the public interest, and is not limited by the contentions of the charging party. On the contrary, the amended Act retains the provisions of the original Act which give the Board broad investigatory power (Section 11) and also retains the provision which permits the Board to amend its complaint at any time prior to the issuance of an order based thereon (Section 10(b)). The significance of these provisions would be seriously curtailed if the General Counsel or the Board were restricted to the violations particularized in a charge.

The circumstances of this case illustrate the importance of these considerations in the administration of the Act. The charge filed by Loner alleged discrimination as to himself. Loner apparently had no interest in alleging that others also were discriminated against by petitioner's practices. But the General Counsel on investigating Loner's charge necessarily discovered that the very gravamen of the case was not discrimination against Loner as an individual but was discrimination against all non-members of the Union. Accordingly, the General Counsel in his complaint recited the precise unlawful conduct charged by Loner—discriminatory wage and vacation payments—and alleged that this conduct discriminated against Loner and all other non-union employees.

The contention that the amended Act added a requirement that charges specify all violations

thereafter to be litigated attributes to Congress a desire fundamentally to alter the purpose hitherto served by a charge and indeed to alter the whole concept of the Board's role. But nothing in the legislative history suggests that Congress intended so to revolutionize the function of the charge. We think it clear that Congress, apart from intending that prompt notice of a pending investigation be furnished the prospective respondent, did not otherwise change the function of the charge, and approved the previous administrative construction, as affirmed by the courts. Cf. *National Labor Relations Board v. Gullett Gin Co.*, 340 U. S. 361, 365-366; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114-115; *Brewster v. Gage*, 280 U. S. 327, 337.

The amended Act, in requiring filing and service of a charge within six months of the commission of unfair labor practices, has added a new and important procedural safeguard in unfair labor practice cases. Service apprises a respondent of the pendency of a charge; it thereby informs him that an investigation may be instituted to determine whether during the preceding six-month period he has committed unfair labor practices, and that a complaint may issue alleging the infractions uncovered. The six-month limitation period thus provides freedom from liability for unfair practices committed before that time, and it thereby performs the usual function

of a statute of limitations, namely, to provide a cut-off date after which answerability for an infraction is no longer exacted.²⁵

This view of the charge is consistent with the pattern of the statute. It recognizes the respective roles which the charge and the complaint play in the statutory scheme, a role which each has satisfactorily played for over 15 years. It affords the safeguards Congress intended without stripping the Board, as petitioner's argument would strip it, of the essential power to investigate and remedy unfair practices committed within the limitations period. Cf. *National Labor Relations Board v. Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C. A. 5) (" * * * the statute is a statute of limitations and not of jurisdiction * * * ").

The considerations outlined above have moved the Courts of Appeals for the First, Third, Fifth, Seventh, and Tenth Circuits, as well as the court below, to reject assertions of invalidity or want of specificity in a charge, similar to the contentions advanced here. See cases cited *supra*, p. 46, n. 24. As the Third Circuit stated in the *Kingston Cake* case, *supra*, 191 F. 2d at 567 (quoted

²⁵ See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53; S. Rep. No. 105, 80th Cong., 1st Sess., p. 26; H. Rep. No. 245, 80th Cong., 1st Sess., p. 40; *National Labor Relations Board v. Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C. A. 5).

with approval by the First Circuit in the *Kobritz* case, *supra*, 193 F. 2d at 15-16—

it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations.

See also the *Bradley Washfountain* case, *supra*, 192 F. 2d at 149, where the court observed: "It is without significance that the complaint was broader than the original charge."

2. It remains true, then, under the amended Act, that the entire statutory scheme shows that the General Counsel's complaint is not confined to the allegations of the charge. And it is clear that the literal language of the six-month limitations proviso does not support petitioner's contrary contention. The proviso prohibits only the issuance of a complaint based upon "*any* unfair labor practice occurring more than six months prior to the filing of the charge." (Emphasis supplied.) If there is any language in Section 10(b) which suggests that the complaint is limited to the allegations of the charge, it is to be found in the opening sentence which provides that "Whenever it is charged that any person has engaged in * * * any * * * unfair labor practice, the Board * * * shall have power to issue * * * a complaint *stating the charges in that respect* * * * " (emphasis supplied). But this language was left unchanged from the orig-

inal Act, under which it had long been settled that the Board had power to allege in its complaint violations not specifically alleged in the charge.

In the present case, at least, it is clear that the purpose of the six-month limitations proviso has been fully served. The conduct alleged in the complaint with respect to all non-union employees was identical with the conduct alleged in the original charge with respect to Loner alone; hence, petitioner was called upon to defend only the action which formed the basis of the original charge. In preparing to respond to this charge, petitioner necessarily preserved the same evidence that it would have preserved had the original charge named all of the employees involved in the single discriminatory act. Thus, every purpose of a statute of limitations was satisfied by the charge in this case. See *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 348-349; *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314.

Petitioner cannot claim hardship or surprise prejudicial to an adequate opportunity to prepare a suitable defense. Petitioner points to no relevant evidence it could have adduced had it been served with a more detailed charge rather than with a fully particularized complaint. In these circumstances it cannot be said that petitioner's rights were prejudiced by any lack of notice by the inclusion in the complaint of em-

ployees whose situation was identical with that of the employee who filed the charge. Cf. *Fort Wayne Corrugated Paper Co. v. National Labor Relations Board*, 111 F. 2d 869, 873 (C. A. 7); *Consumers Power Co. v. National Labor Relations Board*, 113 F. 2d 38, 42 (C. A. 6).²⁶

It follows that the General Counsel in his complaint properly alleged that the conduct specified by Loner in the charge violated the Act, not only with respect to Loner, but with respect to the other employees similarly situated.²⁷

²⁶ The non-union employees, other than Loner, have not been identified, but they are readily identifiable (R. 85-86). In any subsequent proceedings fixing the amounts due the discriminatees (cf. *National Labor Relations Board v. Bird Machine Co.*, 174 F. 2d 404, 405-406 (C. A. 1)), the burden of proving that a particular individual was in fact "similarly situated" to Loner will, of course, rest with the General Counsel.

Petitioner's contention (Br. 41-42) that the lack of a charge on behalf of the other employees "similarly situated" and the failure of the complaint to name these employees precluded it from adducing the testimony of these individuals as to whether each of them had been encouraged to join the Union is merely another facet of its basic contention, discussed above, pp. 33-41, that independent proof of encouragement must be adduced to establish a violation of Section 8 (a) (3).

²⁷ In its Summary of Argument (Br. 9), but not in the Argument itself, petitioner asserts that the amended charge, filed in June 1950, was untimely insofar as it alleged illegality of the union-security clause in the October, 1948 contract and that, therefore, the court below erred in holding that the complaint based upon this allegation was valid. Petitioner did not raise the issue in its petition for certiorari and the question is not properly before this Court. See n. 1 p. 2, *supra*. In any event, the propriety of the ruling of the court below is clear. The 1948 contract was still in effect when the amended

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

✓ ROBERT L. STERN,
Acting Solicitor General.

- ✓ GEORGE J. BOTT,
General Counsel,
 - ✓ DAVID P. FINDLING,
Associate General Counsel,
 - ✓ DOMINICK L. MANOLI,
Assistant General Counsel,
 - ✓ BERNARD DUNAU,
 - ✓ FREDERICK U. REEL,
Attorneys,
National Labor Relations Board.
- April, 1953.

charge was filed and, as the court below observed (R. 123), "••• so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of § 10 (b) had not even begun to operate." Accord: *Superior Engraving Co. v. National Labor Relations Board*, 183 F. 2d 783, 790-791 (C. A. 7), certiorari denied, 340 U. S. 930; *National Labor Relations Board v. United Hoisting Co., Inc.*, 198 F. 2d 465, 468-469 (C. A. 3), certiorari denied, 344 U. S. 914; *Katz v. National Labor Relations Board*, 196 F. 2d 411, 415 (C. A. 9).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

* * *

“UNFAIR LABOR PRACTICES

“Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10.

* * *

(b) Whenever it is charged that an yper-son has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his dis-

charge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

The relevant provisions of the National Labor Relations Act prior to amendment (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 8. It shall be an unfair labor practice for an employer—

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such un-

fair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

1. The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. * * *

FILE COPY

Office - Supreme Court, U.S.

FILED

APR 22 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. ~~371~~ 7

GAYNOR NEWS COMPANY, INC.,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF OF NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY, AS AMICUS
CURIAE**

✓ **STEPHEN C. VLADECK and
SYLVAN H. ELIAS**

*Attorneys for Amicus Curiae,
Newspaper and Mail Deliverers'
Union of New York and Vicinity.*

BLEED THROUGH- POOR COPY

TABLE OF CONTENTS

	PAGE
CONSENT TO FILE	1
INTEREST OF NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY	1
QUESTIONS PRESENTED	2
STATEMENT	2
1. THE FACTS	2
2. THE ACTION OF THE BOARD	3
3. THE DECISION OF THE COURT BELOW	4
ARGUMENT	5
CONCLUSION	7

CASE CITED

National Labor Relations Board v. Rockaway News Supply Co., Inc. (Oct. Term, 1952, Docket No. 318, decided March 8, 1952), 343 U. S. , 97 L. Ed. 470, 474	5, 6
--	------

COURT RULE CITED

Rule 27	1
---------------	---

STATUTES CITED

	PAGE
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. 5, 151, <i>et seq.</i>):	
Section 8 (a) (1)	3
8 (a) (2)	3
8 (a) (3)	3
9 (e)	3
9 (f)	7
9 (g)	7
9 (h)	7
Act by Public Law 189, 82nd Congress, 1st Session (approved October 22nd, 1951) (Taft-Humphrey)	7

IN THE
Supreme Court of the United States
October Term, 1952
No. 371

GAYNOR NEWS COMPANY, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY, AS AMICUS
CURIAE**

Consent to File

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of both parties to the filing of this brief has been filed with the Clerk.

**Interest of Newspaper and Mail Deliverers' Union of
New York and Vicinity**

The Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization which has had collective bargaining agreements with the petitioner since 1943. The order sought to be enforced herein contains direction to petitioner relating to its collective bargaining relationship with the Union.

Unless the order below is modified in part, the Union will have been deprived of its right to engage freely in bargaining with the petitioner without it having been given an opportunity to present its case with regard to the facts at issue before the National Labor Relations Board. Although the questions presented to the Court in this appeal do not deal directly with enforcement of the Board order as entered below, the Union is an interested party in these proceedings.

Questions Presented

1. Does an employer who grants a retroactive wage increase and vacation payment to employees who are Union members violate Section 8 (a) (3) of the National Labor Relations Act when he withholds such benefits from non-members, in the absence of independent proof that his action was intended to, or did in fact, encourage union membership?

2. Whether, following a charge filed by a single employee alleging that because of his non-membership in the Union he was denied benefits granted union members, the Board may properly issue a complaint alleging that the employer had discriminated against the charging employee and all others similarly situated.

Statement

1. The Facts

The Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter called the Union, relates only those facts relevant to its position.

The petitioner and the Union have had collective bargaining agreements covering the delivery department employees for ten years. On January 2nd, 1946, the petitioner

and the Union executed a contract which contained, *inter alia*, a closed shop provision. The original termination date of that contract was October 16th, 1947. It was extended, by supplementary agreement dated August 22nd, 1946, for an additional period of one year to October 16th, 1948.

On October 9th, 1947, the parties entered into a second supplementary agreement relating to retroactivity in the event a new contract was negotiated at the termination of the then existing agreement.

On October 25th, 1948, the parties entered into a new agreement, effective that day, which provided, *inter alia*, for increased wage and vacation benefits.

The contract also provided that all new employees hired by the petitioner were to become members of the Union thirty days following the beginning of their employment. The Union never obtained the authorization, pursuant to a Board conducted election in accordance with the provisions of Sections 9 (e) and 8 (a) (3) of the Taft-Hartley Act, necessary to negotiate a union security provision.

2. The Action of the Board

The Board found, on these facts, that by entering into an agreement with the Union on October 25th, 1948, containing the unauthorized union security provision, the petitioner had interfered with its employees' rights to refrain from union activity in violation of Section 8 (a) (1). The Board found further that the execution of the unauthorized union security agreement resulted in assistance and support to the union in recruiting and maintaining membership in violation of Section 8 (a) (2) of the Act.

The Board order originally deprived the Union of its right to bargain with the employer until it had obtained certification as the collective bargaining agent for the employees. However, when the Union attempted to comply with the order by filing its petition for certification as collective bargaining representative of the employees of the petitioner, the Board refused to hear the petition and schedule an election. The Board instead insisted that there could be no certification of collective bargaining representatives until the petitioner complied with the provisions of the order of the Board. The Board order also required the petitioner to stop performing or giving effect to its contract of October 25th, 1948 and to refrain from executing or enforcing any agreement with the Union which contained a union security clause unless such agreement had been authorized as provided by the Act.

3. The Decision of the Court Below

The Court below, insofar as it is relevant to this brief, modified the Board's order with respect to the requirement that the Union obtain certification of its representative status. The minority below held that it was within the discretion of the Board to require certification of the Union prior to giving effect to any subsequent agreement between the parties.

The Court, however, ordered that the petitioner refrain from "(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employ-

ment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended."

The decision is reported at 197 F. 2d 719.

Argument

As previously stated, the order originally entered by the petitioner required the petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of its employees. The Board has not sought review of this portion of the order which was set aside by the Court below, one Judge dissenting.

We are therefore only concerned with that part of the determination below which prohibits petitioner from giving effect to the contract of October 25th, 1948 with the Union and from entering into or giving effect to any subsequent agreement with the Union which contains a union security clause unless such agreement has been authorized as provided in the Act.

Section 17 of the agreement of October 25th, 1948 with the Union expressly limited the operation of other sections of that contract to the extent permitted by Federal or State law or regulation and further provided that if any section be rendered inoperative by force of law, the remaining provisions would nevertheless remain in full force and effect.

We submit to the Court that the validity of the separability provision in an identical contract was determined by it in *National Labor Relations Board, Petitioner v. Rockaway News Supply Co. Inc., Respondent* (October Term, 1952, Docket No. 318, decided March 9, 1952), 343 U. S.

, 97 L. Ed. 470, 474, where this Court, through Mr. Justice Jackson, stated:

"The features to which the Board rightly objects not only may be severed but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty. * * *

"The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on—labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here."

We submit that the contract referred to by this Court in the *Rockaway News* case, *supra*, was an agreement by the Union entered into collectively with an association of employers known as the "Suburban Wholesalers", of which both Rockaway News Supply Co., Inc. and the petitioner were members at the time of the execution of the disputed contract in October, 1948. In all respects here relevant, the contracts are identical.

Finally, we submit that the alleged invalidity of the agreement of October 25th, 1948, rested solely and completely upon the Union's failure to obtain the necessary consent through the authorized election procedures required at that time.

Those procedures no longer became necessary upon the amendment of the Act by Public Law 189, 82nd Congress, 1st Session (approved October 22nd, 1951). This amendment, commonly known as the Taft-Humphrey bill, completely removed the election requirement which previously had to be satisfied before a Union could enter into a union shop agreement with an employer. All that is now required is that the Union shall have received from the Board a notice of compliance with Sections 9 (f), (g) and (h), unless there has been an election to rescind such authority. The Union is and has been in compliance with Sections 9 (f), (g) and (h) and therefore the agreements now in effect must be considered as valid and binding upon the parties which have entered into them.

CONCLUSION

For the reasons above stated, we respectfully submit that the order entered below be modified to permit the petitioner to give effect to the contract of October 25th, 1948, and to the subsequent agreements between it and the Union.

Respectfully submitted,

STEPHEN C. VLADECK and

SYLVAN H. ELIAS

*Attorneys for Amicus Curiae,
Newspaper and Mail Deliverers'
Union of New York and Vicinity.*

April, 1953.

FILE COPY

Office - Supreme Court, U.S.
FILED

MAR 31 1953

HAROLD S. WILLEY, Clerk

IN THE
Supreme Court of the United States
October Term, 1952

No. ~~371~~ 7

GAYNOR NEWS CO., INC.,

VS.

NATIONAL LABOR RELATIONS BOARD.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

THURGOOD MARSHALL,
JACK GREENBERG,
*Counsel for the N.A.A.C.P. Legal
Defense and Educational Fund, Inc.*

BLEED THROUGH- POOR COPY

IN THE
Supreme Court of the United States
October Term, 1952
No. 371

GAYNOR NEWS CO., INC.,

VS.

NATIONAL LABOR RELATIONS BOARD.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

*To the Honorable, the Chief Justice and the
Associate Justices of the Supreme Court
of the United States:*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., pursuant to Rule 27 of the Rules of the Supreme Court of the United States makes a motion for leave to file a brief as *amicus curiae* in the case of *Gaynor News Co., Inc. v. National Labor Relations Board*, No. 371 in this Court.

1. Consent to file such brief has been requested of the parties. The National Labor Relations Board granted consent. Gaynor News Co., Inc. refused consent. Letters of the parties granting and refusing consent are filed herewith in the office of the Clerk.

2. Movant is an organization engaged in combatting racial discrimination against Negroes. Although it does

not appear that racial discrimination is involved in this case, certain legal principles may be determined here and were determined in the court below, and before the National Labor Relations Board, which immediately affect the rights of Negroes and other minorities in their quest for equal employment opportunity.

Petitioner's position is that no violation of § 8 (a)(3) of the National Labor Relations Act, as amended, exists where the employer favors union workers in pay and other privileges over non-union workers, where the union is a closed union, because in such a situation, non-members cannot be "encouraged" by the discrimination. The Court below rejected this contention.

In many situations in which a labor union is the collective bargaining agent, Negroes and other minority groups are excluded from union membership solely because of race, religion, or national origin. Where Negroes or members of other minorities are barred from union membership, under petitioner's legal theory, the practice of withholding benefits from non-union members is not an unfair labor practice of § 8(a)(3) of the Act, because the differential treatment cannot "encourage" their membership. If this theory prevails, minority group members barred from the union, and denied benefits given union members, will be deprived of the right to file an unfair labor practice charge under § 8(a)(3) before the National Labor Relations Board, which is especially skilled in investigating such charges and enforcing the Act. A decision in this case, therefore, will vitally affect the struggle of large segments of our population to secure job equality and will be of national importance.

3. Movant has not seen the briefs of the parties in this Court and it is of the opinion that these have not yet been submitted. However, it does not believe that facts bearing upon the status of Negro and other minority group workers

will be adequately presented. Movant does not believe that the effect of the practices involved in this case upon minority group workers in encouraging them to secure membership in labor unions, will be adequately presented. Movant submits that these considerations are relevant to the public policy of the United States as it bears upon this case.

4. Movant does not believe that the law concerning the effect of national public policy upon the construction of the ambiguous statutory language of § 8(a)(3) will be adequately presented; for example: the public policy of the United States against racial discrimination and the public policy of the United States relating to the full and efficient utilization of available manpower; nor that the policy of the statute (for example: insofar as it seeks to protect non-union members from practices inimical to the general welfare) will be adequately dealt with in terms of the problems of minority group members posed by this case.

Movant does not intend to file a brief covering matters adequately dealt with by the parties.

5. Movant submits that the above considerations are relevant to the issues at the bar and to the particular holding which may emanate from this Court.

Wherefore movant moves for leave to file a brief herein as *amicus curiae*.

Respectfully submitted,

THURGOOD MARSHALL,
JACK GREENBERG,
*Counsel for the N.A.A.C.P. Legal
Defense and Educational Fund, Inc.*

SUPREME COURT OF THE UNITED STATES

NOS. 5, 6 AND 7.—OCTOBER TERM, 1953.

The Radio Officers' Union of the
Commercial Telegraphers Un-
ion, A. F. L., Petitioner,
5 v.
National Labor Relations Board.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

National Labor Relations Board,
Petitioner,
6 v.
International Brotherhood of
Teamsters, Chauffeurs, Ware-
housemen & Helpers of Amer-
ica, et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Eighth Circuit.

Gaynor News Company, Inc.,
Petitioner,
7 v.
National Labor Relations Board.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[February 1, 1954.]

MR. JUSTICE REED delivered the opinion of the Court.

The necessity for resolution of conflicting interpretations by Courts of Appeals of § 8 (a)(3) of the National Labor Relations Act, as amended, 65 Stat. 601, 29 U. S. C. (Supp. V) § 158 (a)(3), impelled us to grant certiorari in these three cases. That section provides that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."¹

¹ "SEC. 8. (a) It shall be an unfair labor practice for an employer—

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

2 RADIO OFFICERS' UNION v. LABOR BOARD.

The Court of Appeals for the Eighth Circuit in No. 6 (hereinafter referred to as *Teamsters*),² following a deci-

membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made [: and (ii) if, following the most recent election held as provided in section 159 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with section 159 (f)-(h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement ; Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 8 (a) (3) was enacted as part of the Taft-Hartley Act, 61 Stat. 136, in 1947, and amended in 1951, 65 Stat. 601. Provisions added by the 1951 amendment are in italics; provisions eliminated in 1951 are in brackets. This section derived from § 8 (3) of the 1935 Wagner Act, 49 Stat. 452, 29 U. S. C. § 158 (3), with the proviso amended. See note 42 *infra*.

² *Labor Board v. International Brotherhood of Teamsters*, 196 F. 2d 1, certiorari granted, 344 U. S. 853. See also *Labor Board v. Del & Webb Construction Co.*, 196 F. 2d 702.

RADIO OFFICERS' UNION v. LABOR BOARD. 3

sion of the Third Circuit,³ held that express proof that employer discrimination had the effect of encouraging or discouraging employees in their attitude toward union membership is an essential element to establish violation of this section. That holding conflicts with the holdings of the Second Circuit in No. 5 (hereinafter referred to as *Radio Officers*)⁴ and No. 7 (hereinafter referred to as *Gaynor*)⁵ with which decisions of the First⁶ and Ninth Circuits⁷ accord, that such employee encouragement or discouragement may be inferred from the nature of the discrimination. (See Part III, p. 27, *infra*.) In reaching its decision in *Gaynor*, the Second Circuit also rejected the contention, which contention is supported by many decisions of the Courts of Appeals,⁸ that there can be no violation of § 8 (a) (3) unless it is shown by specific evidence that the employer intended his discriminatory action to encourage or discourage union membership. The Second Circuit determined that the employer intended the natural result of his discriminatory action. (See Part II, p. 22, *infra*.) Moreover, *Radio Officers* and *Teamsters* present conflicting views by Courts of Appeals as to the scope of the phrase "membership in any labor organization" in § 8 (a) (3). The Eighth Circuit restricts this phrase to "adhesion to membership," i. e., joining or remaining on a union's membership roster; the Second Circuit, on the other hand, interprets it to include obliga-

³ *Labor Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547. See also *Western Cartridge Co. v. Labor Board*, 139 F. 2d 855.

⁴ *Radio Officers' Union v. Labor Board*, 196 F. 2d 960, certiorari granted, 344 U. S. 853.

⁵ *Gaynor News Co., Inc. v. Labor Board*, 197 F. 2d 719, certiorari granted, 345 U. S. 902. But cf. *Labor Board v. Air Associates, Inc.*, 121 F. 2d 586.

⁶ *Labor Board v. Whiten Machine Works*, 204 F. 2d 883.

⁷ *Labor Board v. Walt Disney Productions, Inc.*, 146 F. 2d 44.

⁸ See, e. g., *Labor Board v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547; *Wells, Inc. v. Labor Board*, 162 F. 2d 457; *Labor Board v. Reynold's International P. Co.*, 162 F. 2d 680; *Labor Board v. Diaper Corp.*, 145 F. 2d 199; *Labor Board v. Air Associates*, 121 F. 2d 586.

4 RADIO OFFICERS' UNION v. LABOR BOARD.

tions of membership, *i. e.*, being a good union member.⁹ (See Part I, p. 18, *infra*.) *Radio Officers* also raises subsidiary questions regarding the interrelationship of § 8 (a)(3) with § 8 (b)(2) of the Act which makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a)(3)" ¹⁰ (See Part IV, p. 32, *infra*.) These cases were argued last term, and, upon our order,¹¹ reargued this term. They reached us in the following manner.¹²

Teamsters. Upon the basis of a charge filed by Frank Boston, a truck driver employed by Byers Transportation Company and a member of Local Union No. 41, International Brotherhood of Teamsters, A. F. L., the General Counsel of the National Labor Relations Board issued a complaint against the union alleging violation of §§ 8 (b)(1)(A) ¹³ and 8 (b)(2) of the National Labor Relations Act by causing the company to discriminate

⁹ See also *Union Starch & Refining Co. v. Labor Board*, 186 F. 2d 1008; *Colonie Fibre Co. v. Labor Board*, 163 F. 2d 65; *Labor Board v. Walt Disney Productions, Inc.*, 146 F. 2d 44; *Sperry Gyroscope Co., Inc. v. Labor Board*, 129 F. 2d 922; *Firestone Tire & Rubber Co.*, 93 N. L. R. B. 981.

¹⁰ 29 U. S. C. (Supp. V) § 158 (b)(2):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

¹¹ 345 U. S. 962.

¹² Requisite engagement in commerce for purposes of the National Labor Relations Act is admitted in all three cases.

¹³ 29 U. S. C. (Supp. V) § 158 (b)(1)(A). This section makes it an unfair labor practice for a union "to restrain or coerce employees

against Boston by reducing his seniority standing because of Boston's delinquency in paying his union dues. A hearing was had before a trial examiner, whose intermediate report was largely adopted by the Board¹⁴ with one member dissenting.

The Board found that the union, as exclusive bargaining representative of the teamsters in the company's employ, had in 1949 negotiated a collective-bargaining agreement with the company which governed working conditions on all over-the-road operations of the company.¹⁵ This agreement established a seniority system under which the union was to furnish periodically to the company a seniority list and provided that "any controversy over the seniority standing of any employee on this list shall be referred to the Union for settlement." Union security provisions of the agreement were not effective due to lack of the authorization then required by § 8 (a) (3) of the Act.¹⁶ The seniority list therefore included both union members and nonmembers. Each new employee of the company, after a thirty-day trial period, was placed at the bottom of this list, and such employee would gradually advance in position as senior members were either removed from the list or reduced

in the exercise of rights guaranteed in section 157 of this Title." Section 157 provides: "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

¹⁴ 94 N. L. R. B. 1494.

¹⁵ This agreement, known as the "Central States Area Over-the-Road Agreement," has been executed with employers by more than 300 locals of the Teamsters Union in 12 different states.

¹⁶ See the bracketed language in note 1, *supra*.

6 RADIO OFFICERS' UNION v. LABOR BOARD.

in their position on it. Position upon the seniority list governed the order of truck-driving assignments, the quality of such assignments, and the order of layoff.

The bylaws of Teamsters Local Union No. 41 provided that "any member, under contract, one month in arrears for dues shall forfeit all seniority rights. . . ." ¹⁷ A member's dues were payable on the first day of each month, and he was deemed "in arrears" for any month's dues on the second day of the following month. Boston did not pay his dues for June 1950, until July 5, 1950. When the union transmitted a new seniority list to the company on the following July 15, Boston, who had previously been eighteenth on the list, was reduced to fifty-fourth, the bottom position on the list. As a result of such reduction Boston was denied driving assignments he would otherwise have obtained and for which he would have received compensation.

Upon these facts a majority of the Board found that the union had violated §§ 8 (b)(1)(A) and 8 (b)(2) of the Act. As to the former, the Board held that the union's reduction of Boston's seniority restrained and coerced him in the exercise of his right to refrain from assisting a labor organization guaranteed by § 7.¹⁸ The Board held that, "absent a valid contractual union security provision, Boston had the absolute protected right under the Act to determine how he would handle his union affairs without risking any impairment of his employment rights and that the Union had no right at any time whether Boston was a member or not a member to make his employment status to any degree conditional upon the payment of dues. . . ." As to the latter, the

¹⁷ "Section 45. Any member, under contract, one month in arrears for dues shall forfeit all seniority rights.

"(a) Clarification of the above paragraph: On the second day of the second month a member becomes in arrears with his dues."

¹⁸ See note 13, *supra*.

Board concluded that the union had caused the company to discriminate against Boston and adopted the Trial Examiner's finding that "the normal effect of the discrimination against Boston was to encourage nonmembers to join the Union, as well as members to retain their good standing in the Union, a potent organization whose assistance is to be sought and whose opposition is to be avoided. The employer's conduct tended to encourage membership in the Union.¹⁹ Its discrimination against Boston had the further effect of enforcing rules prescribed by the Union, thereby strengthening the Union in its control over its members and its dealings with their employers and was thus calculated to encourage all members to retain their membership and good standing either through fear of the consequences of losing membership or seniority privileges or through hope of advantages in staying in. . . ."

The Board entered an order requiring the union to cease and desist from the unfair labor practices found and from related conduct; to notify Boston and the company that the union withdraws its request for the reduction of Boston's seniority and that it requests the company to offer to restore Boston to his former status; to make Boston whole for any losses of pay resulting from the discrimination; and to post appropriate notices of compliance.

The Court of Appeals for the Eighth Circuit denied the Board's petition to enforce its order.²⁰ The court

¹⁹ (Trial Examiner's Footnote.) If, as Respondent appears to suggest, its conduct discouraged membership in a labor organization, it could be argued that from the plain meaning of § 8 (a) (3), a union would equally violate the Act by causing an employer to discriminate against an employee in order to rid itself of slow-paying or otherwise recalcitrant members.

²⁰ 196 F. 2d 1.

8 RADIO OFFICERS' UNION v. LABOR BOARD.

held that "the evidence here abundantly supports the finding of the Board that the respondent caused or attempted to cause the employer to discriminate against Boston in regard to 'tenure . . . or condition of employment,' " but "discrimination alone is not sufficient" and "we can find no substantial evidence to support the conclusion that the discrimination . . . did or would encourage or discourage membership in any labor organization." This conclusion was reached because "the testimony of Boston . . . shows clearly that this act neither encouraged nor discouraged his adhesion to membership in the respondent union"²¹ and because, assuming the effect of the discrimination on other employees was relevant, the court found no evidence to support a conclusion that such employees were so encouraged or discouraged. We granted the Board's petition for certiorari.²²

Radio Officers. Upon the basis of a charge filed by William Christian Fowler, a member of The Radio Officers' Union of the Commercial Telegraphers Union, A. F. L., the General Counsel of the National Labor Relations Board issued a complaint against the union alleging violation of §§ 8 (b) (1) (A) and 8 (b) (2) of the Act by causing the A. H. Bull Steamship Company to discriminatorily refuse on two occasions to employ Fowler. No complaint was issued against the company because Fowler filed no charge against it. Following the usual proceedings under the Act, a hearing was had before a trial examiner, whose findings, conclusions, and recom-

²¹ In this connection, the court pointed out that Boston was a member of the union prior to the discrimination, and retained his status as a member thereafter and that Boston had testified that the discrimination neither encouraged nor discouraged him to remain in the union.

²² 344 U. S. 853.

mendations with certain additions were adopted by the Board.²³

The Board found that at the time the transactions giving rise to this case occurred the union had a collective-bargaining contract with a number of steamship concerns including the Bull Steamship Company covering the employment of radio officers on ships of the contracting companies. Pertinent provisions in this contract are:

"Section 1. The Company agrees when vacancies occur necessitating the employment of Radio Officers, to select such Radio Officers who are members of the Union in good standing, when available, on vessels covered by this Agreement, provided such members are in the opinion of the Company qualified to fill such vacancies.

"Section 6. The Company shall have the right of free selection of all its Radio Officers and when members of the Union are transferred, promoted, or hired the Company agrees to take appropriate measures to assure that such members are in good standing, and the Union agrees to grant all members of the Union in good standing the necessary 'clearance' for the position to which the Radio Officer has been assigned. If a member is not in good standing, the Union will so notify the Company in writing."

The union's contention that this contract provided for a hiring hall under which complete control over selection of radio officers to be hired by any company was given to the union was rejected by the Trial Examiner and by a majority of the Board. Such an agreement would have legalized the actions of the union in this case.²⁴ But the

²³ 93 N. L. R. B. 1523.

²⁴ Such an agreement was permissible under § 8 (3) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 158 (3). The agree-

10 RADIO OFFICERS' UNION v. LABOR BOARD.

Board concluded, primarily from the last sentence of § 6 of the contract, that the contract "was clear on its face and did not provide for any hiring hall arrangement" and that it therefore had not been improper for the Trial Examiner to exclude evidence that general, although not universal, practice had been for radio officers to be assigned to employers by the union.

The Board also found that: On February 24, 1948, the company telegraphed an offer of a job as radio officer on the company's ship *S. S. Frances* to Fowler, who had often previously been employed by the company; Fowler had notified the company that he would accept the job; the company then informed Kozell, the radio officer on the previous voyage of the ship, that he was being replaced by "a man with senior service in the company"; Fowler reported to the *Frances* without seeking clearance from the union and Kozell reported such action to the union; the union secretary wired Fowler that he had been suspended from membership for "bumping" another member and taking a job without clearance and notified the company that Fowler was not in good standing in the union; the union secretary had no authority to effect such a suspension, the suspension was void and Fowler was in good standing in the union at all times material in this case;²⁵ express requests to the union for clearance of Fowler for employment on the *Frances* by the company and by Fowler were subsequently refused, the union

ment in this case was signed on January 11, 1947, and was extended for a period of one year on August 16, 1947. Under § 102 of the 1947 amendments to the National Labor Relations Act, 61 Stat. 152, acts performed under such agreement which would not have been unfair labor practices under § 8 (3) were not unfair practices under the amended act.

²⁵ The Board found that the union secretary's "hasty attempt to suspend" Fowler was "in disregard of Fowler's rights under the union bylaws and constitution . . . in no event could Howe's authority exceed that of the general chairman, who in all instances was required by specific provisions of the bylaws to advise Fowler of his offense

RADIO OFFICERS' UNION v. LABOR BOARD. 11

secretary stating that he would never again clear Fowler for a position with that company although Fowler would be cleared for jobs with other employers; unable to obtain clearance for Fowler, the company gave the job to another man supplied by the union, and Fowler returned to his home in Florida; on April 22, 1948, Fowler returned to New York and again advised the company that he was available for work before reporting to the union; the union secretary told Fowler he was being made "a company stiff" and adhered to his position that he would not clear Fowler for work with that company; clearance sought by the company for Fowler for a job on the S. S. *Evelyn* was subsequently refused, and another man was dispatched to the job by the union.

Upon these facts a majority of the Board found that the union had violated §§ 8 (b)(1)(A) and 8 (b)(2). The Board rejected the union's defense that the union security provision of the contract, preferential hiring for members in good standing, immunized the union's action. They found that Fowler was in good standing at all times notwithstanding his suspension by the union secretary, and that conformity with the union's hiring-hall rules and procedures was not also required by the contract. Thus the Board concluded that the union, by refusing to clear Fowler in both February and April, restrained and coerced Fowler in his statutory right to refrain from observance of the union's rules, and caused the company to discriminate against Fowler by denying him employment. The Board adopted the Trial Examiner's finding that "the normal effect of the discrimination against Fowler was to enforce not only his obedience as a member, of such rules as the Respondent might prescribe, but also the obedience of all his fellow members. It thereby

and to afford him an opportunity to conform with union rules before suspending him. It is clear that Fowler was not given such an opportunity; his purported suspension was therefore ineffectual. . . ."

The power of the Board to make this finding is not challenged here.

12 RADIO OFFICERS' UNION *v.* LABOR BOARD.

strengthened the Respondent both in its control of its members for their general, mutual advantage, and in its dealings with their employers as their representative. It thus encouraged non-members to join it as a strong organization whose favor and help was to be sought and whose opposition was to be avoided. In its effect upon non-members alone, it must therefore be regarded as encouraging membership in Respondent. . . . Finally, by its demonstration of the Respondent's strength, the discrimination in the present case also had the normal effect of encouraging Fowler and other members to retain their membership in the Respondent either through fear of the consequences of dropping out of membership or through hope of advantage in staying in."

The Board entered an order requiring the union to cease and desist from the unfair labor practices found and from related conduct; to notify Fowler and the company that it withdraws objection to his employment and requests the company to offer him employment as a radio officer; to make Fowler whole for any losses of pay resulting from the discrimination, and to post appropriate notices of compliance.

The Court of Appeals for the Second Circuit affirmed the Board's findings and conclusions and granted the Board's petition for enforcement of its order.²⁶ The court agreed that the provisions of the contract "plainly give the company the right to select the man it desires to hire and require the union to grant 'clearance' if the man the company wants is a member in good standing," that "such procedure is not a 'hiring hall' arrangement,"²⁷ and that Fowler was in good standing at the time of refusal of clearance. It rejected the union's contention that its refusal to clear was merely a statement of views concerning breach of its rules and as such was within the

²⁶ 196 F. 2d 960.

²⁷ Judge Clark dissented as to this interpretation of the contract.

RADIO OFFICERS' UNION v. LABOR BOARD. 13

protection of § 8 (c).²⁸ We agree that viewing the record as a whole each of these findings is supported by substantial evidence. *International Brotherhood of Electrical Workers v. Labor Board*, 341 U.S. 694; *Universal Camera Corp. v. Labor Board*, 340 U.S. 474. As to §§ 8 (b)(2) and 8 (a)(3), the court held that "refusal of clearance caused the company to discriminate against Fowler in regard to hire. Without necessary clearance it could not accept him as an employee. The result was to encourage membership in the union. No threats or promises to the company were necessary Whether the union's motive was, as it argues, to enforce the contract provisions against discharging satisfactory radio officers such as Kozell, is immaterial. . . . Such conduct displayed to all non-members the union's power and the strong measures it was prepared to take to protect union members. . . ." The court also held that "a finding that the union has violated § 8 (b)(2) can be made without joining the employer and finding a § 8 (a)(3) violation," and that it was proper to enter a back-pay order against the union without ordering reinstatement by the employer. We granted the union's petition for certiorari.²⁹

Gaynor. Upon the basis of charges filed by Sheldon Loner, a nonunion employee of Gaynor News Company, the General Counsel of the Board issued a complaint against the company alleging *inter alia* violation of §§ 8 (a)(1), (2) and (3) ³⁰ of the Act by granting retro-

²⁸ Section 8 (c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. (Supp. V) § 158 (c).

²⁹ 344 U.S. 853.

³⁰ Section 8 (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title" and § 8 (a)(2) makes

14 RADIO OFFICERS' UNION v. LABOR BOARD.

active wage increase and vacation payments to employees who were members of the Newspaper and Mail Deliverers' Union of New York and Vicinity and refusing such benefits to other employees because they were not union members. The Board adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions.³¹

The Board found that in 1946 the company, engaged in the wholesale distribution and delivery of newspapers and periodicals, entered into a collective-bargaining agreement respecting delivery department employees with the union. This agreement provided for specified wages and paid vacations, and also provided for a closed shop, i. e., restricting employment by the company to members of the union. The agreement, however, permitted the employment by the company of nonunion employees pending such time as the union could supply union employees. This provision was necessary because

it an unfair practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

The original charge filed on February 3, 1949, alleged violation only of §§ 8 (a) (1) and (3) by the above action relative to Loner between July and October 1948. This charge was amended on June 13, 1950, to allege violation of §§ 8 (a) (1) and (2) by executing the October 1948 contract with the illegal union security clause. The complaint issued by the General Counsel on the same day contained all of these allegations and alleged that the discriminatory treatment extended to all nonunion employees. The company contends that inclusion of such employees who did not file charges is prohibited by the six-month statute of limitations period provided in § 10 (b) of the Act. We agree with the Trial Examiner, the Board, and the court below that this charge relates back to the charges timely filed and thus the company was given adequate notice and was not prejudiced by the amendment. *Labor Board v. Kobritz*, 193 F. 2d 8, 14; *Labor Board v. Bradley Washfountain Co.*, 192 F. 2d 144, 149; *Labor Board v. Kingston Cake Co.*, 191 F. 2d 563, 567; cf. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 225, 238.

³¹ 93 N. L. R. B. 299.

RADIO OFFICERS' UNION v. LABOR BOARD. 15

the union was closed, ordinarily admitting to membership only first-born legitimate sons of members. The company at all pertinent times had nonunion as well as union employees in its delivery department. This original agreement was subsequently extended to 1948 and a supplementary agreement was executed by the parties in 1947 providing that in the event the parties negotiated a new contract, the wage rates set therein would be retroactive for three months. In October 1948 the company and the union entered such a new contract which included an invalid union-security clause³² and provided for increased wage and vacation benefits. In this agreement the company expressly recognized the union as exclusive bargaining agent of all employees in the delivery department. In compliance with the 1947 supplementary agreement the company in November 1948 made lump sum payments to its union employees of the differential between the old and new wage rates for the three months' retroactive period. Further payments were subsequently made to union members to compensate for differences in vacation benefits under the two contracts even though the supplementary agreement made no reference to such benefits. The company refused to make similar payments to any of its nonunion employees on the grounds that it was not contractually bound to do so,³³ and, in its business judgment, did not choose to do so.

The Board concluded that, since nothing in the supplementary agreement prohibited equal payment to non-

³² This clause requiring all new employees to become union members within thirty days was not authorized as then required by § 8 (a) (3). See the bracketed language of note 1, *supra*.

³³ The 1946 contract stated that the union was contracting "for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the employer." The president of the company testified before the Trial Examiner that he believed the 1946 contract and the supplementary agreement applied to union members only.

16 RADIO OFFICERS' UNION *v.* LABOR BOARD.

union employees, "the contract affords no defense to the allegation that the Respondent engaged in disparate treatment of employees on the basis of union membership or lack of it . . . ,"³⁴ and held that the company had violated the Act as alleged. The company's arguments that its actions had not violated § 8 (a) (3) because "the record is barren of any evidence that the discriminatory treatment of non-union employees encouraged them to join the union" or had such purpose, and that there could be no such evidence because all the nonunion employees had previously sought membership in the union and been denied because of the union's closed policy were rejected. The Board adopted the Trial Examiner's finding that "it is obvious that the discrimination with respect to retroactive wages and vacation benefits had the natural and probable effect not only of encouraging non-union employees to join the union, but also of encouraging union employees to retain their union membership." We assume this concedes that the employer acted from self-interest and not to encourage unionism. An order was entered requiring the company to cease and desist from the unfair labor practices found and from related conduct; to make whole Loner and all other nonunion employees similarly situated for any loss of pay they have suffered by reason of the company's discrimination against them; and to post appropriate notices of compliance.

³⁴ The Board rejected the company's contention that since the closed shop provision in the 1946 contract was valid under § 8 (3), see note 24, *supra*, and it thus could have legally discharged the nonunion employees during the life of that contract, it could legally retain such employees and contract to discriminate as to their wages.

The Board found, however, that the "evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract. . . ." The Board also adopted the Trial Examiner's finding that, regardless of the status of the wage payment, the retroactive vacation payments were entirely voluntary.

RADIO OFFICERS' UNION v. LABOR BOARD. 17

The Court of Appeals for the Second Circuit, upon the Board's petition, granted enforcement of all parts of the order pertinent here.³⁵ On the issue of the legality of the discrimination, the court distinguished *Labor Board v. Reliable Newspaper Delivery*, 187 F. 2d 547, involving actions closely paralleling the company's here by another company dealing with the same union, stating, "there discrimination resulted from what the court considered the entirely legal action of the minority union in asking special benefits for its members only. The union made no pretense of representing the majority of the employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the court, were quite able to elect their own representative and ask for similar benefits. Not so here. The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members by bargaining for special benefits to union members only, thus leaving the non-union members with no means of equalizing the situation." The court continued, in answer to the company's contention that its action "had neither the purpose nor effect required by § 8 (a)(3)": "discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it 'encourages' union membership, by increasing the number of workers who would like to join and/or their quantum of desire. It may well be that the union, for reasons of its own, does not want

³⁵ 197 F. 2d 719. The court modified parts of the order concerning the illegality of the 1948 contract. Judge Clark dissented as to such modification.

In its brief the company seeks to raise the issue of the illegality of that contract. This question was not presented in the petition for certiorari and is, therefore, not properly before the Court. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U. S. 175.

18 RADIO OFFICERS' UNION *v.* LABOR BOARD.

new members at the time of the employer's violations and will reject all applicants. But the fact remains that these rejected applicants have been, and will continue to be, 'encouraged,' by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to 'seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action.' A union's internal policies are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously 'encouraged' by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the act demands that the employer be deemed a violator." We granted the company's petition for certiorari.³⁶

I. MEANING OF "MEMBERSHIP."

The language employed by Congress in enacting the heart of § 8 (a)(3) is identical with that of the predecessor section in the Wagner Act, § 8 (3): "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." These are the first cases to reach us involving application of this section or its predecessor to the problem of encouragement of union membership by employers. We have on many occasions considered aspects of the application of these sections to actions by employers aimed at

³⁶ 345 U. S. 902.

RADIO OFFICERS' UNION v. LABOR BOARD. 19

discouragement of union membership.³⁷ The principles invoked in those cases are, of course, equally applicable to both aspects of employer discrimination, but most of the issues of statutory construction raised here have not previously been considered by this Court.

In past cases we have been called upon to clarify the terms "discrimination" and "membership in any labor organization." Discrimination is not contested in these cases: involuntary reduction of seniority, refusal to hire for an available job, and disparate wage treatment are clearly discriminatory. But the scope of the phrase "membership in a labor organization" is in issue here. Subject to limitations,³⁸ we have held that phrase to include discrimination to discourage participation in union activities as well as to discourage adhesion to union membership.³⁹

Similar principles govern the interpretation of union membership where encouragement is alleged. The policy of the Act is to insulate employees' jobs from their organizational rights.⁴⁰ Thus §§ 8 (a)(3) and 8 (b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or

³⁷ See, e. g., *Labor Board v. Gullett Gin Co., Inc.*, 340 U. S. 361; *Labor Board v. Universal Camera Corp.*, 340 U. S. 474; *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177; *Republic Steel Corp. v. Labor Board*, 311 U. S. 7; *Labor Board v. Sands Mfg. Co.*, 306 U. S. 332; *Labor Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240; *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1.

³⁸ *Labor Board v. Fansteel Metallurgical Corp.*, *supra*; *Labor Board v. Sands Mfg. Co.*, *supra*; *Southern Steamship Co. v. Labor Board*, 316 U. S. 31. Cf. *Labor Board v. Local Union No. 1229*, 346 U. S. 464.

³⁹ *Associated Press v. Labor Board*, 301 U. S. 103. Cf. *Labor Board v. Kennametal, Inc.*, 182 F. 2d 817; *Peter Cailler Kohler Swiss Chocolate Co. v. Labor Board*, 130 F. 2d 503.

⁴⁰ See § 7, 29 U. S. C. (Supp. V) § 157, note 13, *supra*.

20 RADIO OFFICERS' UNION *v.* LABOR BOARD.

abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8 (a) (3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."⁴¹ Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination.⁴² This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," *i. e.*, employees who receive the benefits of union representation but are unwilling to

⁴¹ The full text of the proviso to § 8 (a) (3) is set out in note 1, *supra*. That Congress intended § 8 (a) (3) to proscribe all discrimination to encourage union membership not excepted by the proviso see H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44, where it is stated that § 8 (a) (3) "prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract."

⁴² Under the Wagner Act the proviso read: "Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in said sections as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made." 29 U. S. C. § 158 (3). See *Colgate-Palmolive-Peet Co. v. Labor Board*, 338 U. S. 355.

contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.⁴³ Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.⁴⁴

From the foregoing it is clear that the Eighth Circuit too restrictively interpreted the term "membership" in *Teamsters*. Boston was discriminated against by his employer because he was delinquent in a union obligation. Thus he was denied employment to which he was otherwise entitled for no reason other than his tardy payment of union dues. The union caused this discrimination by applying a rule apparently aimed at encouraging prompt payment of dues. The union's action was not sanctioned by a valid union security contract, and, in any event, the union did not choose to terminate Boston's membership for his delinquency. Thus the union by requesting such discrimination, and the em-

⁴³ For example, Senator Taft said: "It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation." 93 Cong. Rec. 4191.

In H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 33, it was stated that "The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union in good standing when the employer hires him."

See also 93 Cong. Rec. 4135, 4193, 4272, 4275, 4432; S. Rep. No. 105, 80th Cong., 1st Sess. 6 *et seq.*; H. R. 3020, 80th Cong., 1st Sess. 27-28; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41.

⁴⁴ See *Labor Board v. Eclipse Lumber Co.*, 199 F. 2d 684; *Union Starch & Refining Co. v. Labor Board*, 186 F. 2d 1008.

22 RADIO OFFICERS' UNION v. LABOR BOARD.

ployer by submitting to such an illegal request, deprived Boston of the right guaranteed by the Act to join in or abstain from union activities without thereby affecting his job. *A fortiori* the Second Circuit correctly concluded in *Radio Officers* that encouragement to remain in good standing in a union is proscribed. Thus that union in causing the employer to discriminate against Fowler by denying him employment in order to coerce Fowler into following the union's desired hiring practices deprived Fowler of a protected right.

II. A.—NECESSITY FOR PROVING EMPLOYER'S MOTIVE.

The language of § 8 (a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, in which we upheld the constitutionality of § 8 (3), we said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the object of investigation with full opportunity to show the facts." In another case the same day we found the employer's "real motive" to be decisive and stated that "the Act permits a discharge for any reason other than union activity or agitation for collective bar-

gaining with employees." ⁴⁵ Courts of Appeals have uniformly applied this criteria,⁴⁶ and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of violation of this section.⁴⁷ Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a)(3). For example, a recent report states that "upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute." ⁴⁸

That Congress intended the employer's purpose in discriminating to be controlling is clear. The Senate Report on the Wagner Act said: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform." ⁴⁹ Senator Wagner spoke of § 8 (3) as reaching "those cases where the employer is strong enough to impress his will without the aid of law." ⁵⁰ With this consistent interpretation of that section before it, Congress, as noted above, chose to retain the identical language in its 1947 amendments. No suggestion is found in either the reports or hearings on those amendments that the section had been too narrowly construed, and the House Conference Report states that

⁴⁵ *Associated Press v. Labor Board*, 301 U. S. 103.

⁴⁶ See cases cited, note 8, *supra*.

⁴⁷ *E. g.*, Manoff, *Labor Relations Law*, 82; CCH, *Guidebook to Labor Relations Law*, 142; Wollett, *Labor Relations and Federal Law*, 62; Millis & Brown, *From the Wagner Act to Taft-Hartley*, 428; Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harv. L. Rev.* 1, 20; Ward, "Discrimination" Under the National Labor Relations Act, 48 *Yale L. J.* 1152, 1158.

⁴⁸ N. L. R. B., 10th Annual Report 162.

⁴⁹ S. Rep. No. 573, 74th Cong., 1st Sess. 11.

⁵⁰ Hearings on S. 195, 74th Cong., 1st Sess. 38.

24 RADIO OFFICERS' UNION v. LABOR BOARD.

§ 8 (a)(3) "prohibits an employer from discriminating against an employee by reason of his membership or non-membership in a labor organization, except to the extent he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract." ⁵¹

B.—PROOF OF MOTIVE.

But it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3). This fact was recognized in the House Report on the Wagner Act when it was stated that under § 8 (3) "agreements more favorable to the majority than to the minority are impossible. . . ." ⁵² Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement.⁵³ This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the commonlaw rule that a man is held to intend the foreseeable consequences of his conduct. *Cramer v. United States*, 325 U. S. 1, 31; *Nash v. United States*, 229 U. S. 373, 376; *United States v. Patten*, 226 U. S. 525, 539; *Agnew v. United States*, 165 U. S. 36, 50. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. Our decision in *Re-*

⁵¹ H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44.

⁵² H. R. Rep. No. 1147, 74th Cong., 1st Sess. 21; see also Ward, note 47, *supra*, at 1166.

⁵³ See, e. g., *Labor Board v. Industrial Cotton Mills*, — F. 2d —; *Cusano v. Labor Board*, 190 F. 2d 898; *Allis-Chalmers Mfg. Co.*, 70 N. L. R. B. 48, enforced, 162 F. 2d 435; *Labor Board v. Gluck Brewing Co.*, 144 F. 2d 847.

public Aviation Corp. v. Labor Board, 324 U. S. 793, relied upon by the Board to support its contention that employers' motives are irrelevant under § 8 (a) (3), applied this principle. That decision dealt primarily with the right of the Board to infer discouragement from facts proven for purposes of proof of violation of § 8 (3). In holding that discharges and suspensions of employees under company "no solicitation" rules for soliciting union membership, in the circumstances disclosed, violated § 8 (3), we noted that such employer action was not "motivated by opposition to the particular union or, we deduce, to unionism" and that "there was no union bias or discrimination by the company in enforcing the rule." But we affirmed the Board's holding that the rules involved were invalid when applied to union solicitation since they interfered with the employees' right to organize. Since the rules were no defense and the employers intended to discriminate solely on the ground of such protected union activity, it did not matter that they did not intend to discourage membership since such was a foreseeable result.

In *Gaynor*, the Second Circuit also properly applied this principle. The court there held that disparate wage treatment of employees based solely on union membership status is "inherently conducive to increased union membership." In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof of intent is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job. As noted above,

26 RADIO OFFICERS' UNION v. LABOR BOARD.

the House Report on § 8 (3) of the Wagner Act emphasized that such disparate treatment was impossible under the Act.

In *Gaynor* it was conceded that the sole criteria for extra payments was union membership, and the vacation payments were admittedly gratuitous. The wage differential payments, on the other hand, were based upon the 1947 supplementary agreement which the company below contended was negotiated solely in behalf of union members. However, the court below held that the union was exclusive bargaining agent for both union and non-union employees. The company has not challenged this holding, asserting only that, even though the union represented all employees, the company's only liability to the nonunion employees can be for breach of contract.

The union's representative status obviously does not effect the legality of the gratuitous payment. According to the reasoning of the Second Circuit, however, disparate payments based on contract are illegal only when the union, as bargaining agent for both union and nonunion employees, betrays its trust and obtains special benefits for the union members. That court considered such action unfair because such employees are not in a position to protect their own interests. Thus, it reasoned, if a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give special benefits to the members of the union for if nonmembers are aggrieved they are free to bargain for similar benefits for themselves.

We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent since that case is not before us. We do hold that in the circumstances of this case, the union being exclusive bargaining agent for both its members and nonmember employees, the employer could not, without violating § 8 (a)(3), discriminate in wages solely on the basis of

RADIO OFFICERS' UNION *v.* LABOR BOARD. 27

such membership even though it had executed a contract with the union prescribing such action. Statements throughout the legislative history of the National Labor Relations Act emphasize that exclusive bargaining agents are powerless "to make agreements more favorable to the majority than to the minority."⁵⁴ Such discriminatory contracts are illegal and provide no defense to an action under § 8 (a)(3). See *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192; *Wallace Corp. v. Labor Board*, 323 U. S. 248; *J. I. Case Co. v. Labor Board*, 321 U. S. 332; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342. Cf. *Ford Motor Co. v. Huffman*, 345 U. S. 330.

III. POWER OF BOARD TO DRAW INFERENCES.

Petitioners in *Gaynor* and *Radio Officers* contend that the Board's orders in these cases should not have been enforced by the Second Circuit because the records do not include "independent proof that encouragement of Union membership actually occurred." The Eighth Circuit subscribed to this view that such independent proof is required in *Teamsters* when it denied enforcement of the Board's order in that proceeding on the ground that it was not supported by substantial evidence of encouragement. The Board argues that actual encouragement need not be proved but that a tendency to encourage is sufficient, and "such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination."

⁵⁴ S. Rep. No. 573, 74th Cong., 1st Sess. 13. During a debate on the Act Senator Wagner stated: "Under this proposed legislation, assuming an agreement has been consummated by the agency elected by the majority of the employees, there will be no advantage which a majority can have under an agreement to which the minority is not also entitled, and in order to have that advantage the minority need not join the organization. It can join or not join, either way. It cannot be discriminated against under any other provision of the law." 79 Cong. Rec. 7673. See also note 52, *supra*.

28 RADIO OFFICERS' UNION v. LABOR BOARD.

We considered this problem in the *Republic Aviation* case. To the contention "that there must be evidence before the Board to show that the rules and orders of the employers interfered with and discouraged union organization in the circumstances and situation of each company" we replied that the statutory plan for an adversary proceeding "does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts. . . . An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. . . ." See also *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105; *Labor Board v. Link-Belt Co.*, 311 U. S. 584. In these cases we but restated a rule familiar to the law and followed by all fact-finding tribunals—that it is permissible to draw on experience in factual inquiries.

It is argued, however, that these cases ceased to be good law under the Taft-Hartley amendments. The House Report on their version of § 10 of the amendments, in discussing "shocking injustices" resulting from limited court review of Board rulings, stated that "requiring the Board to rest its rulings upon facts, not interferences [*sic*], conjectures, background, imponderables, and presumed expertness will correct abuses under the act."⁵⁵ We do not read that statement nor statements in the

⁵⁵ H. R. Rep. No. 245, 80th Cong., 1st Sess. 41.

House Conference Report, upon which petitioners rely to support their contention, to hold that the Board may not draw reasonable inferences from proven facts. The House Conference Report stated that under the Wagner Act standard of review courts had "abdicated" to the Board and "in many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even where the findings concerned mixed issues of law and fact [citing cases], or when they rested only on inferences that were not, in turn, supported by facts in the record [citing the *Republic Aviation* case]." ⁵⁶ The report concluded that the amendment to § 10 (e), requiring Board findings to be "supported by substantial evidence on the record considered as a whole," "will be adequate to preclude such decisions as those in" *inter alia* the *Nevada Copper Corp.* and *Republic Aviation* cases.

In *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, we carefully considered this legislative history and interpreted it to express dissatisfaction with too restricted application of the "substantial evidence" test of the Wagner Act. We noted, however, that sufficiency of evidence to support findings of fact was not involved in the *Republic Aviation* case, and stated that the amendment was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." There is nothing in the language of the amendment itself that suggests denial to the Board of power to draw reasonable infer-

⁵⁶ H. R. Rep. No. 510, 80th Cong., 1st Sess. 55. See Cox, *op cit. supra*, note 46, at 39 *et seq.*

30 RADIO OFFICERS' UNION v. LABOR BOARD.

ences. It is inconceivable that the authors of the reports intended such a result for a fact-finding body must have some power to decide which inferences to draw and which to reject. We therefore conclude that insofar as the power to draw reasonable inferences is concerned, Taft-Hartley did not alter prior law.

The Board relies heavily upon the House Report on § 8 (3) which stated that the section outlawed discrimination "which tends to 'encourage or discourage membership in any labor organization' " ⁵⁷ for its conclusion that only a tendency to encourage or discourage membership is required by § 8 (a)(3). We read this language to mean that subjective evidence of employee response was not contemplated by the drafters, and to accord with our holding that such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination.

Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception." Cf. *Labor Board v. Donnelly Garment Co.*, 330 U. S. 219, 231. But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for purposes of violations of § 8 (a)(3). Nor does the Act require that this change in employees' "quantum of desire" to join a union have immediate manifestations.

Obviously, it would be gross inconsistency to hold that an inherent effect of certain discrimination is encouragement of union membership, but that the Board may not reasonably infer such encouragement. We have held that a natural result of the disparate wage treatment in

⁵⁷ H. R. Rep. No. 1147, 74th Cong., 1st Sess. 21.

Gaynor was encouragement of union membership; thus it would be unreasonable to draw any inference other than that encouragement would result from such action. The company complains that it could have disproved this natural result if allowed to prove that *Loner*, the employee who filed the charges against it, had previously applied for and been denied membership in the union. But it is clear that such evidence would not have rebutted the inference: not only would it have failed to disprove an increase in desire on the part of other employees, union members or nonmembers, to join or retain good standing in the union, but it would not have shown lack of encouragement of *Loner*. In rejecting this argument the Second Circuit noted that union admission policies are not necessarily static and that employees may be encouraged to join when conditions change. This proved to be an accurate prophecy regarding the Newspaper and Mail Deliverers' Union, involved in this case, for in 1952 it altered its admission policy to allow membership of "all steady situation holders," thus admitting many employees not previously eligible.

The circumstances in *Radio Officers* and *Teamsters* are nearly identical. In each case the employer discriminated upon the instigation of the union. The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership. Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices. Both *Boston* and *Fowler* were denied jobs by employers solely because of the unions' actions. Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have

32 RADIO OFFICERS' UNION v. LABOR BOARD.

intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved.

IV. SANCTION AGAINST UNION UNDER § 8 (b)(2).

Section 8 (b)(2) was added to the National Labor Relations Act by the Taft-Hartley amendments in 1947. It provides that "it shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Petitioner in *Radio Officers* contends that it was fatal error for the Board to proceed against it, a union, without joining the employer, and that absent a finding of violation of § 8 (a)(3) by and a reinstatement order against such employer, the Board could not order the union to pay back pay under § 8 (b)(2).

We find no support for these arguments in the Act. No such limitation is contained in the language of § 8 (b)(2). That section makes it clear that there are circumstances under which charges against a union for violating the section must be brought without joining a charge against the employer under § 8 (a)(3) for attempts to cause employers to discriminate are proscribed. Thus a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a)(3).⁵⁸ No charge was filed against

⁵⁸ See *Labor Board v. Newspaper & Mail Deliverers' Union*, 192 F. 2d 654. Cf. *Katz v. Labor Board*, 196 F. 2d 411.

RADIO OFFICERS' UNION v. LABOR BOARD. 33

the company by Fowler when he filed his charge against the union. The General Counsel is entrusted with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints,"⁵⁹ but without a charge he has no authority to issue a complaint.⁶⁰ Even when a charge is filed many factors must influence exercise by the General Counsel of this discretion relative to prosecution of unfair labor practices. Abuse of discretion has not been shown, and, when a complaint is prosecuted, the Board is empowered by § 10 (a) "to prevent any person from engaging in any unfair labor practice. . . ." It, therefore, had the power to find that the union had violated § 8 (b) (2).

Nor does the absence of joinder of the employer preclude entry of a backpay order against the union. The union cites in support of its position the language of § 10 (c)⁶¹ which empowers the Board to issue orders requiring "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him:" In *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 189, we interpreted the phrase giving the Board power to order "reinstatement of employees with or without back pay" not to limit, but merely to illustrate the general grant of power to award affirmative relief. Thus we held that the Board could order back pay without ordering reinstatement. The proviso in § 10 (c) was added by the 1947 amendments. The purpose of Congress in enacting this provision was not to limit the power of

⁵⁹ 29 U. S. C. (Supp. V) § 153 (d).

⁶⁰ *Id.*, § 160 (b). But see *Labor Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 17.

⁶¹ 29 U. S. C. (Supp. V) § 160 (c).

34 RADIO OFFICERS' UNION v. LABOR BOARD.

the Board to order back pay without ordering reinstatement but to give the Board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair practices by employers.⁶² Petitioner argues, however, that it will not "effectuate the policies of this Act" to require it to reimburse back pay if the employer is not made to share this burden, but, on the contrary, will frustrate the Act's purposes. We do not agree. It does not follow that because one form of remedy is not available or appropriate in a case, as here, that no remedy should be granted. It is clear that petitioner committed an unfair labor practice and the policy of the Act is to make whole employees thus discriminated against. We therefore hold that the Board properly exercised its power in ordering petitioner to pay such back pay to Fowler.

From the foregoing it follows that:

The Radio Officer's Union v. Labor Board is affirmed.

Labor Board v. International Brotherhood of Teamsters is reversed.

Gaynor News Co. v. Labor Board is affirmed.

No. 5 Affirmed.

No. 6 Reversed.

No. 7 Affirmed.

⁶² See *Labor Board v. J. I. Case Co.*, 198 F. 2d 919, 924; *H. N. Newman*, 85 N. L. R. B. 725, enforced, 187 F. 2d 488; *Union Starch & Refining Co. v. Labor Board*, 186 F. 2d 1008, 1014.

SUPREME COURT OF THE UNITED STATES

NOS. 5, 6 AND 7.—OCTOBER TERM, 1953.

The Radio Officers' Union of the
Commercial Telegraphers Un-
ion, A. F. L., Petitioner,
5 v.
National Labor Relations Board.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

National Labor Relations Board, Petitioner, 6 v. International Brotherhood of Teamsters, Chauffeurs, Ware- housemen & Helpers of Amer- ica, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
--	---	--

Gaynor News Company, Inc., } On Writ of Certiorari
Petitioner, } to the United States
7 v. } Court of Appeals for
National Labor Relations Board. } the Second Circuit.

[February 1, 1954.]

MR. JUSTICE FRANKFURTER, concurring.

In construing an ambiguous provision of a regulatory measure like the Taft-Hartley Act, a decision can seldom avoid leaving more or less discretion to the agency primarily charged with administering the statute. Since guidance in the exercise of this discretion by the Labor Board, and not merely guidance for litigants, thus becomes a function of the Court's opinion, it is doubly necessary to define the scope of our ruling as explicitly as possible.

The lower courts have given conflicting interpretations to the phrase, "by discrimination . . . to encourage or

2 RADIO OFFICERS' UNION v. LABOR BOARD.

discourage membership in any labor organization," contained in § 8 (a)(3). We should settle this conflict without giving rise to avoidable new controversies.

The phrase in its relevant setting is susceptible of alternative constructions of decisively different scope:

(a) On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the employer acted, it is open for the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute.

(b) Even though the evidence of disparate treatment is sufficient to warrant the Board's conclusion set forth in (a), there must be a specific finding by the Board in all cases that the actual aim of the employer was to encourage or discourage union membership.

I think (a) is the correct interpretation. In many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind would be an unnecessary and fictive formality. In such a case the employer may fairly be judged by his acts and the inferences to be drawn from them.

Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone. For example, concededly a raise given only to union members is *prima facie* suspect; but the employer, by introducing other facts may be able to show that the raise was so patently referable to other considerations, unrelated to his views on unions and within his allowable freedom of action, that the Board

RADIO OFFICERS' UNION v. LABOR BOARD. 3

could not reasonably have concluded that his conduct would encourage or discourage union membership.

In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence, which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration. The Board's task is to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn. On the basis of this process, it must determine whether the alleged discriminatory acts of the employer were such that he should have reasonably anticipated that they would encourage or discourage union membership.

Since the issue which the Board thus has to decide involves pre-eminently an exercise of judgment on matters peculiarly within its special competence, little room will be left for judicial review. See *Universal Camera v. Labor Board*, 340 U. S. 474, 488.

What I have written and the Court's opinion, as I read it, are not in disagreement. In any event, I concur in its judgment.

MR. JUSTICE BURTON and MR. JUSTICE MINTON, having joined in the opinion of the Court, also join this opinion.

BLEED THROUGH- POOR COPY

SUPREME COURT OF THE UNITED STATES

NOS. 5, 6 AND 7.—OCTOBER TERM, 1953.

The Radio Officers' Union of the
Commercial Telegraphers Un-
ion, A. F. L., Petitioner,
5 v.
National Labor Relations Board.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

National Labor Relations Board, Petitioner, 6 v. International Brotherhood of Teamsters, Chauffeurs, Ware- housemen & Helpers of Amer- ica, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
--	---	--

Gaynor News Company, Inc.,
Petitioner,
7 v.
National Labor Relations Board.

} On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[February 1, 1954.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I.

No. 7—*The Gaynor Case*.—Eighteen years ago the language considered here became a part of what is now known as § 8 (a) (3) of the Labor Act. The Court today gives that language an entirely new interpretation. I dissent. The Section makes it an unfair labor practice for an employer “by discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization” Unquestionably payment of disparate wages to union and

2 RADIO OFFICERS' UNION v. LABOR BOARD.

nonunion employees is "discrimination" as that term is used in § 8 (a)(3). But the Section does not forbid all "discrimination." It carefully limits the conditions under which "discrimination" is "unfair." The plain and long accepted meaning of § 8 (a)(3) is that it forbids an employer to discriminate only when he does so *in order to* "encourage or discourage" union membership. *Labor Board v. Waterman S. S. Co.*, 309 U. S. 206, 219. Recently, however, the Labor Board has adopted the view that the Section outlaws discrimination merely having a "tendency to encourage . . ." or "the natural and probable effect" of which would be to encourage union membership. The Court apparently now accepts this interpretation, for here there is no finding that Gaynor acted in order to encourage union membership. Indeed, the Board concedes that Gaynor had no such purpose, and this concession is fully supported by the evidence. Gaynor had no desire to make retroactive payments to any employees. It yielded to the union not because it wanted to but because it was compelled to by a collective bargaining contract.

I think the Court's new interpretation of § 8 (a)(3) imputes guilt to an employer for conduct which Congress did not wish to outlaw. Behind the Labor Act was a long history of employer hostility to strong unions and affection for weak ones. Power over wages, hours and other working conditions permitted employers to help unions they liked and hurt unions they disliked. To enable workers to join or not join unions without fear of reprisal, Congress passed the Labor Act prohibiting such employer discrimination. But aside from this limitation on the employer's powers, Congress did not mean to invade his normal right to fix different wages, hours and other working conditions for different employees accord-

RADIO OFFICERS' UNION v. LABOR BOARD. 3

ing to his best business judgment.¹ Section 8 (a)(3) is aptly phrased to accomplish both these purposes.

The Board has been careful in § 8 (a)(3) cases to make findings that employer discrimination was motivated by hostility or favoritism toward union membership.² Even now trial examiners and the Board con-

¹ *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46 (1937); *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 182-183 (1941).

² See, e. g., *Fruehauf Trailer Co.*, 1 N. L. R. B. 68, 74-77 (1935), sustained, 301 U. S. 49, 55-57 (1937); *Union Pacific Stages, Inc.*, 2 N. L. R. B. 471, 486 (1936), enforced as modified, 99 F. 2d 153, 168, 176-177 (C. A. 9th Cir. 1938); *Kansas City Power & Light Co.*, 12 N. L. R. B. 1414, 1436-1453 (1939), enforced as modified, 111 F. 2d 340, 349-351 (C. A. 8th Cir. 1940); *Martel Mills Corp.*, 20 N. L. R. B. 712, 721, 724, 733 (1940), enforcement denied, 114 F. 2d 624, 630-633 (C. A. 4th Cir. 1940); *Air Associates, Inc.*, 20 N. L. R. B. 356 (1940), enforced as modified, 121 F. 2d 586, 591-592 (C. A. 2d Cir. 1941); *Stonewall Cotton Mills*, 36 N. L. R. B. 240 (1941), enforced as modified, 129 F. 2d 629, 632-633 (C. A. 5th Cir. 1942); *Western Cartridge Co.*, 48 N. L. R. B. 434 (1943), enforced as modified, 139 F. 2d 855, 858-860 (C. A. 7th Cir. 1943); *Robbins Tire and Rubber Co.*, 69 N. L. R. B. 440, 441 (1946), enforced, 161 F. 2d 798, 801 (C. A. 5th Cir. 1947); *Wells, Inc.*, 68 N. L. R. B. 545, 546-547 (1946), enforced as modified, 162 F. 2d 457, 459-460 (C. A. 9th Cir. 1947); *Victor Mfg. & Gasket Co.*, 79 N. L. R. B. 234, 235 (1948), enforced, 174 F. 2d 867, 868 (C. A. 7th Cir. 1949); *B & Z Hosiery Products Co.*, 85 N. L. R. B. 633 (1949), enforced, *Bochner v. Labor Board*, 180 F. 2d 1021 (C. A. 3d Cir. 1950). To support its position here that an employer's purpose is irrelevant under § 8 (a)(3) the Board relies on its decisions in *General Motors Corp.*, 59 N. L. R. B. 1143, 1145 (1944), enforced as modified, 150 F. 2d 201 (C. A. 3d Cir. 1945); *Allis-Chalmers Mfg. Co.*, 70 N. L. R. B. 348, 349-350 (1946), enforced, 162 F. 2d 435 (C. A. 7th Cir. 1947); and *Reliable Newspaper Delivery Inc.*, 88 N. L. R. B. 659, 669-670 (1950), enforcement denied, 187 F. 2d 547 (C. A. 3d Cir. 1951). In the first two decisions specific findings of employer purpose were made, and in the latter the facts are substantially identical to the case here.

4 RADIO OFFICERS' UNION v. LABOR BOARD.

tinue to make findings as to the employer's purpose.³ The courts have regularly held that § 8 (a) (3) requires such findings, and have been called on to determine if they were supported by substantial evidence.⁴ I think the Section should not at this late date be held to penalize an employer for using his judgment in fixing working conditions unless he discriminates among employees in

³ *E. g.*, in *Marathon Electric Mfg. Co.*, 106 N. L. R. B. No. 199 (September 29, 1953), the trial examiner found that numerous acts of an employer violated § 8 (a) (3) because the employer "discriminated . . . to discourage membership in UE. . . ." In sustaining the examiner as to some of the acts and overruling him as to others the Board's decision rested on such findings as: "the discharges were not only calculated to discourage concerted activities . . . but also to deter . . . from joining, or giving support in the future to; UE or any other labor organization"; the record did not show "that the failure to recall them [certain employees] was because of their actual or supposed connection with UE"; and there was "no evidence in the record to rebut the Respondent's [employer's] contention that its only reason for not recalling these employees was the cancellation of the contract." See also *New Mexico Transportation Co.*, 107 N. L. R. B. No. 8 (November 13, 1953); *Terri Lee, Inc.*, 107 N. L. R. B. No. 141 (December 28, 1953).

⁴ See court decisions cited in note 2, *supra*. See also *Labor Board v. Waterman S. S. Co.*, 309 U. S. 206, 218, 220-226 (1940), where this Court reviewed the record and held that a finding of discrimination by an employer "because of" union membership was sustained by substantial evidence. *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793 (1945), indicated no intent to repudiate the interpretation of § 8 (a) (3) accepted in the *Waterman* case, *supra*. The Board also relies on such cases as: *Labor Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C. A. 6th Cir. 1942), enforcing 34 N. L. R. B. 815, 826-827 (1941); *Labor Board v. Gluek Brewing Co.*, 144 F. 2d 847, 853 (C. A. 8th Cir. 1944), modifying and enforcing 47 N. L. R. B. 1079, 1095 (1943); and *Labor Board v. Industrial Cotton Mills*, — F. 2d — (C. A. 4th Cir. 1953), modifying and enforcing 102 N. L. R. B. 1265 (1953). However, none of these cases is in point here, since in each the Board made findings of the employer's purpose.

RADIO OFFICERS' UNION *v.* LABOR BOARD. 5

order to strengthen or weaken a union for his own advantage. For this reason, I would not sustain the Board's holding that Gaynor violated § 8 (a)(3).

II.

Nos. 5 and 6—The Radio Officers and Teamsters Cases.—In these cases the Board found that the Radio Officers and Teamsters unions had violated § 8 (b)(2) of the Taft-Hartley Act which makes it an "unfair labor practice" for a union "to cause or attempt to cause an employer to discriminate against an employee in violation" of § 8 (a)(3). The Board found on sufficient evidence that each of the two unions here "caused" an employer to treat an employee differently from the way it treated other employees, that is, the employer was caused "to discriminate" within the meaning of § 8 (a)(3). The Board also found that this "discrimination" had a tendency to encourage union membership. But there was no finding that either employer's discrimination occurred *in order* to encourage union membership. For the reasons set out in my discussion of § 8 (a)(3) in the *Gaynor* case, I think these findings fall short of showing an employer "violation of § 8 (a)(3)." A union does not violate § 8 (b)(2) by causing an employer to discriminate unless that employer discrimination is "in violation of § 8 (a)(3)." For this reason I would reverse No. 5 and affirm No. 6.